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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In re:

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6 LEHMAN BROTHERS HOLDINGS INC.,

7 et al., Case No. 08-13555(SCC)

8 Debtors.

9 - - - - - x

10 In re:

11

12 LEHMAN BROTHERS INC., Case No. 08-01420(SCC)

13 (SIPA)

14 Debtor.

15 - - - - - x

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

19

20 January 22, 2015

21 10:05 AM

22

23 B E F O R E :

24 HON SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Adversary proceeding: 08-01420-scc Lehman Brothers, Inc.
2 Doc. # 10810 Motion Pursuant to Federal Rule of Bankruptcy
3 Procedure 9019(a) for Entry of an Order Approving Settlement
4 Among the Trustee, Pacific Investment Management Company,
5 LLC, and Participating Counterparties

6

7 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
8 Doc. #7666 One Hundred Sixty-Second Omnibus Objection to
9 General Creditor Claims (No Liability Claims)

10

11 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
12 Doc. #8246 Two Hundred Seventh Omnibus Objection to General
13 Creditor Claims (No Liability Claims)

14

15 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
16 Doc. #5863 Thirty-Seventh Omnibus Objection to General
17 Creditor Claims (No Liability Claims)

18

19 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
20 Doc. #5889 Forty-First Omnibus Objection to General Creditor
21 Claims (No Liability Claims)

22

23 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
24 Doc. #5904 Forty-Fifth Omnibus Objection to General Creditor
25 Claims (No Liability Claims)

1 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
2 Doc. #6132 Sixty-Third Omnibus Objection to General Creditor
3 Claims (No Liability Claims)
4
5 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
6 Doc. #6145 Sixty-Fourth Omnibus Objection to General
7 Creditor Claims (No Liability Claims)
8
9 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
10 Doc. #6556 Eighty-Seventh Omnibus Objection to General
11 Creditor Claims (No Liability Claims)
12
13 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
14 Doc. #6728 One Hundred First Omnibus Objection to General
15 Creditor Claims (Employee Equity Claims)
16
17 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
18 Doc. #7158 One Hundred Thirty-First Omnibus Objection to
19 General Creditor Claims (Employee Equity Claims)
20
21 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
22 Doc. #7159 One Hundred Thirty-Second Omnibus Objection to
23 General Creditor Claims (Employee Claims)
24
25

1 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
2 Doc. #7526 One Hundred Fifty-Fourth Omnibus Objection to
3 General Creditor Claims (Employee Claims)

4

5 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
6 Doc. #7832 One Hundred Seventy-First Omnibus Objection to
7 General Creditor Claims (Employee Claims)

8

9 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
10 Doc. #8639 Two Hundred Twenty-Seventh Omnibus Objection to
11 General Creditor Claims (Employee Claims)

12

13 Adversary proceeding: 08-01420-scc Lehman Brothers Inc.
14 Doc. #9161 Two Hundred Forty-Second Omnibus Objection to
15 General Creditor Claims (Employee Claims)

16

17 08-13555-scc Lehman Brothers Holdings, Inc.
18 Doc. #24762 Omnibus Application of (I) Individual Members of
19 Official Committee of Unsecured Creditors and (II) Indenture
20 Trustees Pursuant to Section 1129(a)(4), Or, Alternatively,
21 Sections 503(b)(3)(D) and 503(b)(4) of Bankruptcy Code for
22 Payment of Fees and Reimbursement of Expense

23

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1 P R O C E E D I N G S

2 THE COURT: You can have a seat.

3 All right. How is everyone today?

4 MR. FUNKHOUSER: Fine, Your Honor.

5 THE COURT: Ready when you are.

6 MR. FUNKHOUSER: I'm Rob Funkhouser from Hughes,
7 Hubbard & Reed for the SIPA trustee for Lehman Brothers,
8 Inc.

9 THE COURT: Okay.

10 MR. FUNKHOUSER: I'm very pleased to report that
11 the first item on the agenda is an uncontested matter.

12 THE COURT: Yes.

13 MR. FUNKHOUSER: -- the trustee's 9019 motion to
14 approve the settlement with the PIMCO claimants.

15 THE COURT: Okay.

16 MR. FUNKHOUSER: This resolves the last major
17 disputed item with respect to SIPA customer claims on terms
18 favourable to the LBI estate and to the creditors. It is
19 the product of months of extensive discussions and
20 reconciliation work, including extensive exchanges with the
21 PIMCO representatives and -- at Clifford Chance.

22 The declarant for the motion, Aleni Theadosio (ph)
23 is here in the courtroom. She played a key role in the
24 reconciliation process over the many months and would be
25 happy to answer any questions on the declaration.

1 SIPC's representative, Ken Pudo (ph) is also here
2 and can attest to SIPC's support for an approval of this
3 settlement.

4 As set forth in the motion the settlement, if
5 accepted, will resolve 81 claims asserting customer status
6 for collateral and meets all of the criteria for the Iridium
7 factors for settlement as set forth in length in the motion.

8 In addition to court approval, the settlement is
9 contingent on acceptance and participation of the PIMCO
10 claimants so that if contrary to everyone's expectations
11 there's some clients that don't decline, we'll have the
12 opportunity to start over. The expectation is that everyone
13 will --

14 THE COURT: Okay.

15 MR. FUNKHOUSER: -- be accepting the settlement
16 and we're very pleased with it and move for its approval.

17 THE COURT: Okay. The -- with respect to the
18 transferred claims, there's a procedure by which the trustee
19 can proceed as long as it agrees with the purchaser of the
20 transferred claims on substantially similar terms, correct?

21 MR. FUNKHOUSER: That's correct. That's correct.

22 THE COURT: I guess I'm just pausing on the
23 substantially similar. It seems to me that I'm just -- I'm
24 recognizing that I'm approving some leeway without there
25 being a real kind of delineation of what that is.

1 MR. FUNKHOUSER: Well, the full -- the numbers
2 that we identify in the motion and that are set forth in the
3 declaration about the overall impact on all of the -- on the
4 reserves and the release of the reserves that will result
5 from treatment of these in accordance with the proposed
6 settlement includes the transferred claims.

7 THE COURT: Right.

8 MR. FUNKHOUSER: So that the overall effect of the
9 settlement applies to all 81 claims --

10 THE COURT: Okay.

11 MR. FUNKHOUSER: -- and the transferred claims are
12 included in that 81 --

13 THE COURT: Okay. All right.

14 MR. FUNKHOUSER: The \$21 million payment by the --

15 THE COURT: I see what you're saying.

16 MR. FUNKHOUSER: -- by the estate includes those
17 claims. If for some reason they don't participate it will
18 be less than \$20 million.

19 THE COURT: Okay. I got you.

20 The other thing was the mutual release. That was
21 a negotiated part of the settlement?

22 MR. FUNKHOUSER: That's correct, Your Honor.

23 THE COURT: Because usually there's not a release
24 going the other way.

25 MR. FUNKHOUSER: With respect to the general

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1 creditor claims we have had mutual releases on -- on a
2 number of the settlements in situations where there are
3 transactions in which the LBI estate could conceivably have
4 a claim against --

5 THE COURT: Okay.

6 MR. FUNKHOUSER: -- the claimant in addition to
7 the --

8 THE COURT: Okay.

9 MR. FUNKHOUSER: -- the ones that the claimant has
10 against the estate.

11 THE COURT: Okay. All right. Well, other than
12 that I don't have any questions.

13 Does anyone else wish to be heard on the 9019
14 motion with respect to the PIMCO settlement?

15 Okay. It clearly falls above the lowest range of
16 reasonableness, satisfies all of the Iridium factors and is
17 in the best interest of the estate and will be approved.

18 MR. FUNKHOUSER: Thank you, Your Honor.

19 With your permission we'll move out of the way for
20 the contested motions.

21 THE COURT: Sure.

22 MR. FUNKHOUSER: Thank you, Your Honor.

23 (Pause)

24 THE COURT: Good morning.

25 MR. MITCHELL: Good morning, Your Honor. Stewart

1 Mitchell from Hughes, Hubbard & Reed on behalf of the LBI
2 trustee. I'll be addressing the second and third items on
3 the agenda --

4 THE COURT: Okay.

5 MR. MITCHELL: -- discussing the two-hundred-and-
6 seventh omnibus objection filed by the trustee. And just as
7 a note, as was also referenced in our papers, there's one
8 claim on the two-hundred-and-seventh that is duplicative of
9 the claim on --

10 THE COURT: Okay.

11 MR. MITCHELL: -- the one-sixty-second. We're
12 treating them all --

13 THE COURT: All right. So not surprisingly the
14 way I've prepared for this is to attempt to kind of put
15 things into buckets and I'm going to rely on you to help
16 guide me through everything so that nothing is missed or
17 overlooked.

18 MR. MITCHELL: Okay. Understood.

19 THE COURT: All right.

20 MR. MITCHELL: All right. Thank you. And you --
21 I'm happy to answer any questions as they arise.

22 THE COURT: Okay.

23 MR. MITCHELL: I just -- in the first instance, so
24 these claims, Your Honor, are claims based -- are securities
25 fraud claims -- that's the way they're framed --

1 THE COURT: Right.

2 MR. MITCHELL: -- and they're based on the
3 ownership of securities known as cash settled call warrants.
4 These were issued by LBHI --

5 THE COURT: Right.

6 MR. MITCHELL: -- high risk, privately issued,
7 highly restricted, et cetera. Claimants filed claims,
8 separate claims in the Chapter 11 proceeding based on the
9 same securities. Those claims were allowed at the fair
10 market value of the warrants as of --

11 THE COURT: Right.

12 MR. MITCHELL: -- commencement. Okay.

13 As we understand, these claims have gone through
14 several different iterations, some starting as customer
15 claims. But as we understand from the claimants' pleadings
16 now, the only claims that they are pressing against LBI at
17 this time are the securities fraud claims. Again, I'm happy
18 to discuss the procedural history if you have questions or
19 any other bases.

20 So because they're the securities fraud claims,
21 that's the basis that I'll be addressing today.

22 Because the claimants are asserting securities
23 fraud claims in a federal bankruptcy proceeding, they are
24 required to make those claims or assert those claims with
25 the particularly required by the Federal Rules of Civil

1 Procedure, specifically 9(b). The claimants have failed to
2 do so. The claimants have not asserted specific statements
3 that are allegedly fraudulent, let alone who made the
4 statement, where the statements were made, how, why they're
5 fraudulent, and taking all of the facts alleged together how
6 those facts raise a strong inference of intent on the part
7 of LBI to defraud the claimants with respect to these
8 warrants.

9 What the claimants have done is offer several
10 conclusions in their papers. For instance, in their
11 objection to the trustee's determination of their customer
12 claims, the claimants are going to say that LBI fraudulently
13 induced them to invest in the warrants. In their position
14 to the two-hundred-and-seventh omnibus objection they
15 conclude that LBI represented to its customers that LBHI was
16 capable of fulfilling its obligations to pay on the warrants
17 should the investment criteria demand.

18 But they've alleged, again, no specific
19 particularized statements to support those conclusions. One
20 statement that they've pointed to in particular is a risk
21 factor in the private placement memoranda. The -- there
22 were several risk factors listed in the PPMs that the
23 realization of which could result in the warrants being
24 valued at zero. And the risk factor that the claimants
25 point to is the risk factor with respect to LBHI credit

1 worthiness.

2 That statement is factually correct. It was
3 obviously a relevant risk factor, but there's no allegation,
4 there's no specific statement indicating that their brokers
5 or anyone at LBI said they should ignore that risk factor or
6 that anyone was of the opinion that LBHI would not be
7 solvent when these warrants were sold in mid-2007 or early
8 to mid-2008; that LBHI would not be able to make good.

9 The claimants have also incorporated thousands of
10 pages of documents filed in other proceedings referencing
11 statements made by LBHI with respect to the health of LBHI.
12 But, again, with respect to these statements none of them
13 are linked by any particularized pleading in connection with
14 their warrants.

15 The particularized pleading rules are there to --
16 in place to put the trustee on notice as to what the claims
17 are. Without those particularities, the claim -- the
18 trustee cannot determine the validity of the claim. As
19 such, the claims are insufficient.

20 At this point because of the number of times the
21 claimants have had the opportunity to plead their claims, we
22 don't see the particularized statements. We anticipate,
23 after the number of pleadings that are out there, we would
24 have seen satisfy -- you know, statements satisfying the
25 pleading requirements because we don't see them. The

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1 trustee believes it is appropriate at this time to ask that
2 these claims be disallowed and expunged as we requested --

3 THE COURT: Well, let me --

4 MR. MITCHELL: -- in the two-hundred-and-seventh?

5 MR. FUNKHOUSER: -- let me ask you a question that
6 was my first question when I began to read all the papers,
7 but it wasn't addressed until Footnote 7 of the reply which
8 is filed at Docket 10890, and that's the 510(b) point.

9 MR. MITCHELL: Uh-huh. Yes, Your Honor.

10 THE COURT: So the trustee says, and the claimants
11 disagree, but the trustee says, you know, Rule 9(b)
12 particularly pertains. They would have to allege it.

13 So -- and subject to counsel's rights to be heard,
14 I agree with that. Okay. But --

15 MR. MITCHELL: Okay.

16 THE COURT: -- let's posit that we have a Rule
17 9(b) compliant, very particularized complaint and, in fact,
18 it's all true. It's still a 510(b) claim.

19 MR. MITCHELL: Understood.

20 THE COURT: I mean, I'm asking you, is it not?

21 MR. MITCHELL: Right. We -- Your Honor, yes, we
22 do. Again, to go back to the -- when the claims were --
23 when the initial objection was filed, we didn't see any
24 substance in there and so substantively the objection -- the
25 decision was let's go forward and say these are

1 insufficient. And you're right. To the extent there are,
2 we do -- we are reserving rights to object on 510(b) and
3 that would be the next steps.

4 THE COURT: Right. I mean, sometimes it's done in
5 the opposite order --

6 MR. MITCHELL: Understood.

7 THE COURT: -- right? You say -- you assume that
8 they're meritorious and you say it wouldn't matter because
9 they're just going to be subordinated under 510(b) so let's
10 not go through that whole exercise.

11 So I've only been at this for a year, but
12 sometimes the trustee or the estate takes it in one order,
13 510(b) first, sometimes they take it in another order. I
14 mean, it's kind of like a brain teaser which way you should
15 do it first. But I just want -- it seemed to me that based
16 on that footnote that you were thinking along those lines.
17 But as you just said, because in the trustee's view the
18 claims are so lacking in merit, that you're seeking simply
19 to expunge them.

20 MR. MITCHELL: Yes, Your Honor. That's correct.

21 THE COURT: Okay. All right.

22 Thank you.

23 MR. MITCHELL: You're welcome.

24 (Pause)

25 THE COURT: Good morning.

1 MR. SALOMON: Good morning, Judge. I'm Chester
2 Salomon. I'm with Becker Glynn.

3 THE COURT: Okay.

4 MR. SALOMON: And I represent the creditors, the
5 claimants in this case. If you would like I can start with
6 your 510(b) question, Judge.

7 THE COURT: Okay.

8 MR. SALOMON: It's something that we've looked at.
9 510 -- we understand that a security will be -- of an
10 affiliate may be subordinated.

11 THE COURT: Right.

12 MR. SALOMON: But there's -- it's something
13 interesting here. The trustee never argued that before this
14 reply. They filed objections in February of 2014 --

15 THE COURT: Okay.

16 MR. SALOMON: -- and this issue was never raised,
17 and I'll tell you why I think it was never raised. If you
18 look at 510(b) it refers to a security. A security, in
19 turn, is defined in Section 101.49 of the code. Section
20 101.49(b) says, "Security does not include option, warrant
21 or right to subscribe to or purchase or sell a commodity
22 futures contract."

23 We believe that the claims do -- are not
24 securities for bankruptcy purposes. However, they are
25 securities certainly in the securities purposes, and that is

1 why the fraud claim was filed in the manner that it was
2 filed.

3 THE COURT: So let's look at 101 again.

4 (Pause)

5 THE COURT: You're pointing me to which section?

6 MR. SALOMON: 101.49(b)(4). I'm sorry. Did I say
7 49? Yes. I did say -- it is 49.

8 THE COURT: Right. Okay. You want to -- you want
9 to read all of that?

10 MR. SALOMON: No, Judge. I don't think you have
11 to. I think it just says that for purposes of the
12 definition of --

13 THE COURT: No. No. No.

14 MR. SALOMON: -- security. Of course --

15 THE COURT: Right.

16 MR. SALOMON: -- security includes a lot of
17 things. It includes stock and bonds and debentures.

18 THE COURT: Right. Right.

19 MR. SALOMON: That's (a). Then you get to (b) --

20 THE COURT: (b).

21 MR. SALOMON: -- where it says things that are not
22 included.

23 THE COURT: Yes.

24 MR. SALOMON: And it says "option, warrant, or
25 right to subscribe or purchase or sell a commodity futures

1 contract."

2 THE COURT: Right.

3 MR. SALOMON: Because this is a warrant --

4 THE COURT: No. No. No. No. No. No. No.

5 Read all the words.

6 MR. SALOMON: Yes.

7 THE COURT: Option, warrant or right to subscribe
8 to or purchase or sell a commodities future contract.

9 MR. SALOMON: Yes.

10 THE COURT: Is this a warrant to sell a
11 commodities future contract?

12 MR. SALOMON: It is a warrant, Your Honor --

13 THE COURT: Okay. But you're not --

14 MR. SALOMON: -- not --

15 THE COURT: But, Mr. Salomon, you're not reading
16 the words. You're stopping after warrant. It says, option,
17 warrant or right to subscribe to or purchase or sell a
18 commodities future contract.

19 MR. SALOMON: Well, Your Honor, I contend that the
20 word "warrant" or "option" is not limited to commodities
21 contract.

22 THE COURT: Okay. Then --

23 MR. SALOMON: That's something that --

24 THE COURT: Okay. But then --

25 MR. SALOMON: -- may need to be briefed.

1 THE COURT: But then we get to the second point,
2 and none of this has been briefed, that to the extent that
3 these are called warrants, okay, they're not warrants in the
4 ordinary sense of warrants. These are debt instruments.
5 These are debt securities. They represent a right to
6 receive a stream of payments. They're not all warrant in
7 the Corporate Law 101 sense.

8 MR. SALOMON: Well, I understand that, Judge.
9 That -- they are characterized as warrants and I agree that
10 there were obligations of -- obligations of LBHI that were
11 sold to my clients. And those obligations were not
12 registered as securities. They -- many, many, like hundreds
13 of LBHI obligations and bonds were registered as securities.
14 These were not.

15 THE COURT: Okay. Well, I think that in -- as a
16 matter of procedural fairness, I mean, these issues have not
17 been fully briefed and the trustee has moved as was
18 clarified on the merits if you will of the pleading of these
19 claims.

20 Your position is that it's a proof of claim and
21 that more particularity is not required.

22 MR. SALOMON: It is a -- that is generally the
23 case, Your Honor, that it's rare that you see a short and
24 plain statement of a proof of claim in the form of a claim
25 as suggested by the trustee; that is to say that it has to

1 comply with all of the details.

2 And by the way I think we have asserted that claim
3 by adopting the exhibits that are attached.

4 THE COURT: You can't -- that's not the way
5 pleading works. Pleading doesn't work by incorporating by
6 reference hundreds or thousands of pages of stuff that half
7 of which is -- would never be admissible in any sense. The
8 examiner's report is not evidence. If you -- if you want to
9 assert a claim and join issue on a claim, you actually have
10 to write specific allegations.

11 MR. SALOMON: I understand that, Your Honor. Can
12 I just respond to your comment? I understand that full
13 well.

14 THE COURT: Sure.

15 MR. SALOMON: But I -- but you of course are aware
16 -- I think Your Honor is aware of the procedural history
17 here. Initially, my clients filed customer claims. They
18 filed --

19 THE COURT: Yes.

20 MR. SALOMON: -- them timely --

21 THE COURT: Right.

22 MR. SALOMON: -- in 2000 -- early 2009.

23 THE COURT: And judge -- and they became and they
24 were not allowed as customer claims and they were re-
25 characterized if you will as creditor claims subject to

1 further proceedings as to their validity.

2 MR. SALOMON: That is correct, Your Honor.

3 THE COURT: Okay.

4 MR. SALOMON: And -- but that was after, that was
5 after we filed a supplemental statement and other papers
6 before Judge Peck and after Judge Peck had a hearing on
7 October 28th, 2010 --

8 THE COURT: Right.

9 MR. SALOMON: -- and it was -- and after -- and
10 even at that time in 2010 we did not file the securities --
11 the equity debt securities litigation materials because we
12 were not then aware of that. We were not members of that
13 class of -- the large class of creditors who were asserting
14 \$31 billion of claims.

15 THE COURT: Okay.

16 MR. SALOMON: Our claims were only for several
17 million dollars. And they were out of a special issue of
18 LBHI for a total of about five or six -- I'm sorry, about
19 \$50 million or so that had been raised through the device of
20 the warrants. And we -- and those -- but those -- the claim
21 and the examiner's report were part of the claim that was
22 before Judge Peck.

23 If the trustee --

24 THE COURT: But Judge Peck was simply sorting --
25 at that point sorting into customer claim or not. It was

1 binary. And Judge Peck's -- that determination was simply,
2 this is not a customer claim. Move out of the customer
3 claim bucket. Move over, possibly, into the creditor claim
4 bucket subject to -- and we can find the exact language --
5 subject to the determination of the allowability or the
6 validity of the claim.

7 So it says "converted to." The customer claims
8 order says that the claims are "converted to general
9 creditor claims of the LBI estate subject to further
10 determination by the trustee as to validity and amount."

11 MR. SALOMON: I understand.

12 THE COURT: Okay. So --

13 MR. SALOMON: But they weren't allowed --

14 THE COURT: Right.

15 MR. SALOMON: -- and that I understand. But they
16 were recognized as claims, general creditor claims.

17 THE COURT: No. No. No. No. No. They
18 were converted to general creditor claims subject to further
19 determination by the trustee as to validity and amount.
20 That's not a blessing of any kind on the validity of the
21 claims. It says the opposite.

22 MR. SALOMON: Judge, even though I don't think
23 it's really necessary because the trustee well knows what
24 happened here -- he referred to it in his preliminary
25 investigation report filed in August of 2010 about the

1 examiner's report that had been previously filed some seven
2 months earlier -- we could re-plead and would re-plead --

3 THE COURT: But let me go back to this point. Are
4 you suggesting to me that you -- as you stand here today
5 these claims are valid general creditor claims by virtue of
6 that order?

7 MR. SALOMON: No. I'm not saying that.

8 THE COURT: Okay. Then I don't understand the
9 point of this entire --

10 MR. SALOMON: There was just --

11 THE COURT: -- piece of our conversation.

12 MR. SALOMON: Validity has to be determined by the
13 Court. Allowance has to be --

14 THE COURT: Okay.

15 MR. SALOMON: -- determined. That --

16 THE COURT: Right.

17 MR. SALOMON: -- was very clear.

18 THE COURT: Okay.

19 MR. SALOMON: It was just recognition that what
20 had been a general -- a customer claim is now --

21 THE COURT: Which had been --

22 MR. SALOMON: -- a general unsecured claim.

23 THE COURT: No. What had been alleged to be a
24 customer claim --

25 MR. SALOMON: Yes.

1 THE COURT: -- was determined to not be a customer
2 claim and is now alleged to be a creditor claim.

3 MR. SALOMON: All right. I accept that, Your
4 Honor.

5 THE COURT: Okay. Excellent.

6 MR. SALOMON: And what -- what I --

7 THE COURT: So -- but what does that have to do
8 with the price of tea in China as they say?

9 MR. SALOMON: Well, we've talked about two things
10 in today's hearing. The first is the lack of specificity --

11 THE COURT: Right.

12 MR. SALOMON: -- for the -- specificity --

13 THE COURT: Right.

14 MR. SALOMON: -- excuse me -- for these claims
15 which the trustee says he can't judge the merit of these
16 claims. So --

17 THE COURT: Right.

18 MR. SALOMON: -- there -- and because -- and does
19 not apply to Federal Rule of Civil Procedure 9(b), I
20 believe. And it does not satisfy that requirement. We say
21 that we do by the documents that were submitted, but we also
22 say to Your Honor that if -- that we would -- we would be
23 prepared to amend the claim, amendments are freely granted
24 in this court. We would be prepared to amend the claim to
25 assert specifically as to these entities --

1 THE COURT: And these claimants.

2 MR. SALOMON: -- these claimants because they were
3 -- you know, these were small customers of LBI who got calls
4 from brokers. We have something that you can make some
5 money with and you can't invest innocuous in millennium
6 because you're too small for those investments, but you can
7 invest in Lehman Brothers Holdings and make the same kind of
8 money. You've got to hold your investment till 2011 and
9 2012 they were told back in 2007 and 2008. And that is what
10 they went in for.

11 They were not told, and we've said it many times,
12 Your Honor, and I don't want to repeat myself, but we've --
13 they were not told that -- anything about what was happening
14 at Lehman. And the management of Lehman, LBI and LBHI were
15 virtually identical.

16 THE COURT: Well, on that, that's another point of
17 significant contention. That statement that LBI and LBHI
18 were virtually identical, that's a -- that's painting with
19 an extremely broad brush and ignoring the fact that these
20 are separate estates. There's been no veil piercing. That
21 ship has sailed.

22 So to the extent that you have something very
23 specific in that regard that you believe you can allege, you
24 can allege it.

25 MR. SALOMON: Okay.

1 THE COURT: But as a general matter, there's not
2 going to be a finding that LBI and LBHI all the same.

3 MR. SALOMON: We don't need that, Judge.

4 THE COURT: Okay.

5 MR. SALOMON: It's the notion of attribution and
6 imputation. This is what we rely on in our papers, a
7 statement made by an executive and actions by an executive
8 of -- that is a representative of two related companies can
9 be attributed to both those companies. And that's what
10 we're saying. In the securities litigation the -- they were
11 only focused on LBHI. They didn't talk about LBI in that
12 proceeding. I suspect the reason it was because there was a
13 stay against LB -- as to any action against LBI. So --

14 THE COURT: So if your clients are speaking to LBI
15 employees, right --

16 MR. SALOMON: Yes.

17 THE COURT: -- and you're saying that those LBI
18 employees should be treated as LBHI employees?

19 MR. SALOMON: No, Judge. No. I'm saying -- I'm
20 looking -- talking principally about LBI senior management.

21 THE COURT: Right.

22 MR. SALOMON: That's full Gregory, O'Mara, Callon
23 --

24 THE COURT: Those guys spoke to your clients?

25 MR. SALOMON: They did not speak to their clients.

1 They were senior managers of LBI. They were also senior
2 managers of LBHI. They knew -- depending on which hat they
3 were wearing and it doesn't matter which -- well, depending
4 on which hat they were -- I shouldn't say depending on what
5 hat they were wearing. They knew for both companies. They
6 had the knowledge of what was happening with Repo 105, what
7 was -- that their assets were understated, their liabilities
8 were understated, and that the statements, the SEC -- I'm
9 sorry, the -- yes, the SEC reports and statements were not
10 correct. They knew that and they omitted that.

11 And you can't say, as the trustee has in his
12 papers, he does what seems to me like a Jekyll and Hyde
13 thing that the bad things that the senior managers did were
14 only while they were Mr. Hyde at LBHI, but not while they
15 were Dr. Jekyll at LBI. And, therefore, they contend that
16 there should be no attribution of the actions and statements
17 by the senior managers.

18 I don't think the brokers knew, Judge, what was
19 going on in the executive suite; that is to say the
20 registered representatives of LBH -- LBI who dealt with my
21 clients. I don't think they actually knew. Their bosses
22 knew. And it was the failure to impart that information
23 that was known to the senior management of LBI that is at
24 the crux of this. They had a culpable knowledge. They were
25 trying to raise money for their affiliate, LBHI. They were

1 going to get some commissions if they pedaled this stuff --
2 the warrants on the clients.

3 But, no, I don't think -- you know, I do think
4 that executives of LBI were knowledgeable about the fraud
5 and the financial shenanigans at LBHI that were so well
6 reported in the examiner's report and found, found by Judge
7 Kaplan in his July 27, 2011 opinion.

8 And, again, I want to come back, Judge. The
9 reason why you don't have a pleading in front of you right
10 now is all of this was long after the deadline for filing
11 claims, long after the trustee objected to the --

12 THE COURT: Okay. But we can --

13 MR. SALOMON: -- the customer claims.

14 THE COURT: -- fix that because if I were to -- if
15 I were to deny the -- or overrule the objection and say,
16 great, let's go to trial, we don't have anything to go -- I
17 don't have anything to go to trial on.

18 MR. SALOMON: So, then, Your Honor, may I suggest
19 --

20 THE COURT: But before you --

21 MR. SALOMON: -- that --

22 THE COURT: -- move onto that, though, I would
23 like you to -- like to hear your view on the no double
24 payment argument.

25 MR. SALOMON: Oh, Judge, it's the single

1 satisfaction rule.

2 THE COURT: Right.

3 MR. SALOMON: It's been around a long time.

4 THE COURT: Right.

5 MR. SALOMON: We can't get -- we're not going to
6 get double payment.

7 THE COURT: Fine. Okay.

8 MR. SALOMON: We might get 20 to 35 cents on the
9 dollar for the LBHI claims all in --

10 THE COURT: The LBHI, not --

11 MR. SALOMON: I'm sorry. LBHI claims all in. And
12 as best I can tell from the trustee's reports and estimates
13 that I've heard, maybe at top 35 cents, 30, 35 cents on the
14 dollar for LBI.

15 So if it's 20 to 35 for LBHI (sic) and 35 for LBI,
16 that's not a double recovery. That's not even a whole
17 recovery. It's just a claim against another entity that
18 we're trying to assert.

19 THE COURT: All right. Let me hear from LBI. All
20 right. Thank you.

21 MR. SALOMON: Thank you, Judge.

22 MR. MITCHELL: Thank you, Your Honor.

23 If you would like, I'm happy to address the
24 question on 510(b) briefly, the trustee's position or --

25 THE COURT: Well, it's a -- you know, I put you

1 all on the spot just because I focused on that footnote and
2 I have so many 510(b) issues floating around that I'm always
3 thinking of it.

4 So I don't think it would be fruitful, since it
5 hasn't really been appropriately briefed and raised. But --

6 MR. MITCHELL: Understood.

7 THE COURT: -- what Mr. Salomon is saying, you
8 know, okay, the usual rules should pertain. Give me a
9 chance to re-plead. So that's -- that's where we are --

10 MR. MITCHELL: Yeah.

11 THE COURT: -- at this point.

12 MR. MITCHELL: Yes, Your Honor. And just to take
13 that -- take that line of argument up, hearing the same
14 thing again from Mr. Salomon and hearing the arguments
15 brought forward, if they're -- if the argument is that the
16 brokers didn't know and the brokers didn't make any
17 particularized statements, then, again, as Your Honor has
18 noted, what -- what are we discussing, what can the trustee
19 look to to determine the validity of the claim, where do we
20 even go from here. If the contention is still that these --
21 the statements at issue are ones that are -- have been
22 attributed to LBHI, they should be attributed to LBI, then I
23 think we're back in the same place of saying any re-
24 pleading, if that's the framework, would be futile because
25 then we continue to face the same issues that raised -- the

1 trustee raised in his reply.

2 As you noted, there's clear distinction between
3 these parties. Imputation is a factor in a veil piercing
4 argument. That legal framework has not been asserted, plus
5 there are issues with standing, can the claimants bring that
6 as you note.

7 So, again, we would just -- it seems like if there
8 was a re-pleading at this point it would just be back to the
9 same issue, and the trustee believes that it would be
10 futile. Given the nature of the pleadings thus far, the
11 claimants have had ample opportunity to re-plead. The
12 trustee has looked at their papers and given weight to the
13 things that they've said. We just don't see that there's
14 anything there that satisfies the heightened pleading
15 requirements in this case.

16 THE COURT: Okay. Thank you.

17 MR. MITCHELL: Thank you.

18 THE COURT: Anything else, Mr. Salomon?

19 MR. SALOMON: Your Honor, most of -- most of the
20 statements that we made were in response to 510(b) and the
21 issues. There are other things that came up in the
22 trustee's reply. May I have an opportunity to speak to
23 them? And I'll try to stay away from securities fraud
24 because I think you know where I'm coming from in terms --

25 THE COURT: But for the securities fraud claim are

1 you going to allege that a particular broker made a
2 particular statement to one of the claimants?

3 MR. SALOMON: Failed to, Judge, failed, the broker
4 never informed.

5 THE COURT: Are you going to make a particular --

6 MR. SALOMON: As I mentioned the broker --

7 THE COURT: Are you going to make a particular
8 allegation that that particular broker knew, as you said,
9 what was going on at LBHI?

10 MR. SALOMON: I will not do that as to a
11 particular broker, Your Honor. I am talking about --

12 THE COURT: Then how do you --

13 MR. SALOMON: -- LBI senior management.

14 THE COURT: But your clients were not speaking to
15 Mr. Fauld (ph). Your clients were speaking to their broker.

16 MR. SALOMON: And, therefore, they -- the broker
17 must be omniscient. That broker worked as a cog in a huge
18 institution, Lehman Brothers, Inc., a large investment bank,
19 and, no. I'm not saying that these brokers should have even
20 known that. Their senior managers should have known that,
21 Judge.

22 THE COURT: Okay.

23 MR. SALOMON: And the senior management should
24 have instruct -- should have not ever issued those -- the
25 warrants in the first place. But having done so, they

1 should have accurately reported what they had done and what
2 the correct financial picture was; that repos were -- repo
3 105s --

4 THE COURT: So if -- so if I subscribe to your
5 construct, every single person who bought an LBHI "security"
6 at the suggestion or under the auspices of an LBI broker
7 should have your phone number because they've got this huge
8 securities fraud claim.

9 MR. SALOMON: Judge, I'm out of time on that.

10 They --

11 THE COURT: No. I'm asking you.

12 MR. SALOMON: I'll answer --

13 THE COURT: I'm asking you --

14 MR. SALOMON: -- your question.

15 THE COURT: -- the question because when you look
16 out over this enormous landscape, right, it is not
17 insignificant that when you look at a class of tens or
18 hundreds of folks, right, frequently the trustee or the
19 debtor will object to an enormous number of claims, right?
20 And nobody will respond except for one person. Well, that
21 -- that's an indication of the likelihood of success on the
22 merits; that the -- that -- because that one guy, it's a
23 long shot that he's smarter than the other 99 guys.

24 So my question to you is if your construct in fact
25 works, then everybody, everybody who had LBI as their broker

1 and who bought LBHI securities during a certain time frame
2 when, as you put it, the shenanigans were going on they've
3 got, in your view, a valid creditor claim against LBI for
4 securities fraud.

5 MR. SALOMON: Judge, there were \$31 billion of
6 claims that, in fact, have been asserted against LBHI in the
7 District Court class action. That class action,
8 unfortunately for me, I won't get a phone call. Nobody's
9 going to ask for my phone number for that. Why, because all
10 of those claims were settled --

11 THE COURT: But that's against LBHI --

12 MR. SALOMON: -- in the class --

13 THE COURT: It's against LBHI.

14 MR. SALOMON: Your Honor, I -- I'm not sure of
15 that at all. They waived their claims and I don't know if
16 they waived their claims against LBI. Perhaps you should
17 ask the trustee whether or not the settlement of the class
18 action -- I think the trustee appeared at the settlement
19 hearing for LBHI and may be familiar with that settlement
20 agreement. My assumption is that LBI -- as part of that
21 settlement they waived claims against LBHI. Now these are
22 all securities --

23 THE COURT: You mean against LBI.

24 MR. SALOMON: Waived claims against LBHI and all
25 of LBHI's affiliates. But that's a question to ask the

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1 trustee. I'll stand aside if you were to ask that question
2 of him.

3 THE COURT: No. I -- look, as far as I'm
4 concerned I have no question that Rule 9 which requires a
5 claims of fraud be plead with particularity applies to
6 proofs of claim that are at this mature stage, i.e. on the
7 precipice of either a motion to dismiss or proceeding to
8 trial. They need to be pled with particularity and not by
9 reference to voluminous other documents.

10 So I agree with you that leave to re-plead is free
11 legal granted and I'll send you back to the drawing board
12 one last time to craft an appropriate securities fraud
13 complaint.

14 MR. SALOMON: Very well.

15 Thank you, Judge.

16 THE COURT: Time frame. Can you set a time frame?

17 MR. SALOMON: Yes.

18 THE COURT: Okay. When do you think you can have
19 it done?

20 (Pause)

21 MR. SALOMON: Sixty days, Judge.

22 THE COURT: Okay. All right. So if someone would
23 -- if you folks would work together to prepare an order
24 disposing of the trustee's objection and granting the leave
25 to re-plead no later than 60 days from the -- from today's

1 date.

2 MR. MITCHELL: Yes, Your Honor. We'll prepare
3 that.

4 THE COURT: All right.

5 MR. SALOMON: Thank you, Your Honor.

6 THE COURT: Okay. Thank you.

7 MR. SALOMON: Thank you, Your Honor. We'll turn
8 the podium over now to Karen Chau for the next matter.

9 THE COURT: Yes.

10 (Pause)

11 MS. CHAU: Your Honor, Karen --

12 THE COURT: Good morning.

13 MS. CHAU: -- Chau. Good morning. Karen Chau,
14 Hughes, Hubbard & Reed for the trustee.

15 The next item -- items on the agenda are 43 claims
16 filed by former employees of LBI or other entities that were
17 subject to 13 different omnibus objections --

18 THE COURT: Right.

19 MS. CHAU: -- but they all have claims that we've
20 termed the equity award or accrued equity claims.

21 THE COURT: Right.

22 MS. CHAU: So as long as it makes sense to you
23 we'll deal with them all together.

24 THE COURT: Okay. This is some very strong
25 feelings of déjà vu --

1 MS. CHAU: Yes, Your Honor.

2 THE COURT: -- for me. And perhaps it would make
3 sense for me to talk to Mr. Schager first because he covers
4 a large number of these claims.

5 MS. CHAU: Yes, Your Honor.

6 THE COURT: And I'm going to rely on you to help
7 me sort everything and to make sure I've covered everything
8 before we conclude today.

9 MS. CHAU: Sure.

10 THE COURT: Okay.

11 How are you, Mr. Schager?

12 MR. SCHAGER: I'm well, Your Honor, and yourself?
13 Thank you.

14 THE COURT: I'm good.

15 So --

16 MR. SCHAGER: Just for the record if I may, Your
17 Honor, I'll note I'm here with Andrew Goldenberg also --

18 THE COURT: Okay.

19 MR. SCHAGER: -- but just the two of us today. I
20 don't know if there are any pro se's appearing. This firm
21 represents 35 of the claim -- of the 43 claimants at issue
22 on these 13 motions and I don't -- I've had no contact with
23 the other --

24 THE COURT: Okay.

25 MR. SCHAGER: -- six or seven, so I don't know if

1 they're here or not.

2 THE COURT: All right.

3 So the first and obvious question is you -- you
4 are, of course, familiar with the decision that was issued
5 in the LBHI case with respect to the so-called RSU claims.

6 MR. SCHAGER: Yes, Your Honor.

7 THE COURT: And we're not going to re-tread that
8 ground. So I guess I just don't understand given that, why
9 we're talking about that on these claims.

10 MR. SCHAGER: Your Honor, I would answer that by
11 pointing you to three factors. I think --

12 THE COURT: I mean, other than that --

13 MR. SCHAGER: Yeah.

14 THE COURT: -- you think that I was wrong, which I
15 -- which I understand you -- you're up on appeal and --

16 MR. SCHAGER: Yeah.

17 THE COURT: -- that's fine. But there's no
18 substantive distinction between these claims that you're
19 asserting here and the LBHI claims other than, of course,
20 that you're asserting these claims against LBI and the RSUs
21 are -- were, my view, equity interests in LBHI. So you're
22 one step further removed.

23 MR. SCHAGER: That's right, Your Honor. The
24 claims here are employer/employee claims. It is the
25 employees claiming against the direct employer, LBI, for

1 their compensation.

2 THE COURT: That --

3 MR. SCHAGER: Obviously, Your Honor, we understand
4 your decision on the RSUs and if the RSUs have value, that's
5 going to have a lot of impact on the RSU claims that are
6 asserted here. There are two other claims that I think we
7 haven't addressed. But it would have a major impact on the
8 RSU claims here.

9 Even as of last night, Your Honor, as far as our
10 research reveals there is still not a District Court or an
11 Appeals Court that has really addressed whether RSUs are
12 securities in the context of the Bankruptcy Code.

13 THE COURT: Okay. But --

14 MR. SCHAGER: You've got your decision and Judge
15 Glenn's, and you've got a Fifth Circuit decision that I read
16 as frankly being contrary.

17 THE COURT: Okay.

18 MR. SCHAGER: And I think we need appellate
19 authority on that.

20 THE COURT: That's fine. I --

21 MR. SCHAGER: On the RSU claims, Your Honor --

22 THE COURT: -- have no problem with that. But I
23 don't understand -- I don't understand other than for me to
24 say out loud that the ruling in LBHI with respect to the
25 RSUs applies to these claims and then you have that for

1 purposes of appeal, are you -- is there an argument here
2 that somehow this is different -- these are different and,
3 therefore, all of that reasoning doesn't apply?

4 I'm just trying to understand. To me it's the
5 same exact arguments. These are claims to be paid in RSUs
6 of LBHI. That was the currency. It was stock in LBHI.

7 MR. SCHAGER: Once again, Your Honor, I agree that
8 if the decision stands it has some impact here. I think
9 there are some permutations to that, and that would be a
10 point that we raised in our initial oppositions to the
11 omnibus objections and we raised again in a briefing -- I
12 have a briefing late last night, Your Honor, that is in the
13 system. I could hand up a copy if you wish to see it.

14 THE COURT: I don't know what --

15 MR. SCHAGER: But --

16 THE COURT: I don't know what you're talking
17 about. I'm sorry. I lost you. I -- let --

18 MR. SCHAGER: The question is did LBI enforceably
19 cause LBHI to undertake the obligation to compensate LBI's
20 employees.

21 Now there is a practical side of that and there's
22 a legal side to it. On a practical side, these weren't just
23 handing out RSUs. They were inter-company transfers that
24 took place here. LBI basically paid LBHI to issue the RSUs.
25 There was an inter-company credit. LBHI brought a proof of

1 claim against LBI in this proceeding saying, hey, wait a
2 minute. You owe us some money for these RSUs. That claim
3 was denied. LBI didn't have to pay for some portion of
4 those RSUs.

5 And if LBI did not pay LBHI to assume the
6 obligation to the employees, then why is LBI off the hook to
7 the employees here. It hasn't paid for those RSUs yet. and
8 that's an issue that's just not --

9 THE COURT: Well, whoa. Whoa. Whoa.

10 MR. SCHAGER: -- in the evidence yet.

11 THE COURT: Whoa. Whoa. Whoa. We're really
12 wandering far off the reservation.

13 MR. SCHAGER: I don't' think so, Your Honor. But,
14 please, go ahead.

15 THE COURT: These are claims for -- these are
16 claims of people that have RSUs, right? The RSUs, if life
17 had been better, if there had been a bailout and Lehman had
18 survived and Lehman's stock had soared, the RSUs would be
19 valuable and no one would be complaining.

20 We're here because that didn't happen. So now the
21 holders of those RSUs, now worthless, are saying, we want
22 cash instead. Those RSUs were issued under a variety of
23 programs which gave discretion as to how the bonus should be
24 paid. Discretion. We looked at all those letters in the
25 trial. It said, in our sole discretion we can pay all of

1 this in restricted stock units and that happened.

2 What your clients spent the better part of three
3 days trying to convince me was that because those RSUs now
4 are not worthless. They can't vest because of the
5 bankruptcy, et cetera, we want cash instead. I said, no.

6 So now what you're saying is, wait a minute.

7 Because there was some arrangement, you say, between LBI and
8 LBHI, somehow that has a bearing on whether or not that RSU
9 piece of paper that your clients are holding should be
10 retroactively turned into a claim for cash. That's got
11 nothing to do with it.

12 MR. SCHAGER: Well, Your Honor, I'm going to --

13 THE COURT: But where --

14 MR. SCHAGER: -- approach that same set of facts
15 --

16 THE COURT: -- where is it --

17 MR. SCHAGER: -- from a slightly different --

18 THE COURT: -- where is any of this in the papers?

19 MR. SCHAGER: We've addressed it in the response
20 to the omnibus reply that we provided last night, Your
21 Honor.

22 THE COURT: Oh, but --

23 MR. SCHAGER: And --

24 THE COURT: -- there was no provision for a
25 surreply. And I'm sorry to break it to you, but I wasn't

1 reading documents at 9:00 last night. So I haven't read
2 that and if you want to file a surreply you have to ask
3 permission. So I don't know what you're talking about. So
4 why don't you tell me?

5 MR. SCHAGER: I am doing my best, Your Honor, and
6 I will say on the surreply we were not able to find anything
7 in the rules on it. Maybe we missed it and I apologize for
8 that. We got a very late reply -- omnibus reply last week
9 and we did our best to put in a response as quickly as we
10 could. But there were some new issues raised in the omnibus
11 reply and we did our best to address them.

12 But let me go back to your important point here on
13 the rights of the holders of RSUs. Judge Sweet (ph)
14 addressed this issue in a case last summer. Unfortunately,
15 he addressed it after our briefing on the -- for the
16 November 3rd decision was complete. But Judge Sweet had a
17 class action in front of him involving a directors and
18 officers policy by a class of shareholders and there was a
19 subclass of RSU holders coming in saying, Your Honor, we are
20 shareholders. We have shareholders' rights. And the class
21 opposed it. Judge Sweet, an artist from the bench, clearly
22 arranged for the settlement under which the RSU holders who
23 held vested rights, vested RSUs participated as
24 shareholders. Unvested RSUs --

25 THE COURT: So --

1 MR. SCHAGER: -- did not.

2 THE COURT: So what?

3 MR. SCHAGER: Well, what happens to the unvested
4 holders of RSUs? What do they have? They're left with a
5 promise of compensation that was never fulfilled.

6 THE COURT: No. They got RSUs that were not able
7 to vest. That's what they got. There -- I --

8 MR. SCHAGER: But the --

9 THE COURT: Number one, you --

10 MR. SCHAGER: -- the RSU -- no. We're talking
11 about the equity holders. If they hold securities can they
12 participate in the settlement as securities, and the impact
13 of that decision is no, they do not. They don't have
14 securities which is consistent with the Fifth Circuit
15 decision saying all you've got is this contract claim to get
16 compensated some day.

17 Now those -- those are the issues that are going
18 up on appeal, Your Honor. I agree that if you're affirmed
19 on appeal there's no question that that's going to have an
20 impact here. My own --

21 THE COURT: Okay. So let --

22 MR. SCHAGER: -- preference would be --

23 THE COURT: -- let's --

24 MR. SCHAGER: -- just to hold this --

25 THE COURT: -- let's start with that. Okay.

1 We've now -- I've now gotten the answer that I was looking
2 for.

3 If you -- if I'm reversed on appeal, I'm reversed
4 on appeal. Then we would have to revisit this. But right
5 now there's absolutely no distinction and -- other than the
6 fact that these claims are more attenuated because they're
7 against LBI with respect to RSUs in LBHI.

8 LBI said we're going to pay you with these RSUs in
9 LBHI. LBI did that. Moreover, even if -- and this is a
10 footnote in the decision -- even if there was a failure to
11 issue the RSUs under med diversified, that's still a
12 subordinated claim.

13 So --

14 MR. SCHAGER: If I had a couple of minutes, Your
15 Honor, I would be glad to address that accrued entity claim.

16 THE COURT: Go ahead. I'll give you all the time
17 you like.

18 MR. SCHAGER: Yeah. And, yes. Footnote 18 gets a
19 lot of attention. It gets it in this proceeding, too.

20 Where that started, that whole issue of the
21 accrued equity, was in a hearing that Judge Peck had in
22 December 2011, and we've quoted passages of that transcript
23 to you both in prior briefs and in this one that we
24 submitted last night and you -- and that is, wait a minute,
25 LBI, we've got to do -- LBHI. We've got to do a better job

1 of organizing this because I'm hearing about some claims out
2 here where money was withheld from these people's pay check
3 and I think you've got to address that.

4 And LBHI did address that and paraded this in
5 several hearings in front of Judge Peck, again, which we've
6 quoted saying, Your Honor, we took care of those claims. We
7 allowed them. And, you know, the process was a little
8 unusual because once again there were one of these games
9 that were played and we caught them at the games and they
10 had -- they had to clean up --

11 THE COURT: I get --

12 MR. SCHAGER: -- the offer.

13 THE COURT: Once again, I've --

14 MR. SCHAGER: That's -- that's all --

15 THE COURT: Once again I have no idea what you're
16 talking about. I'm sorry. I just --

17 MR. SCHAGER: The short of it is the accrued
18 equity claims were recognized and allowed and they were
19 allowed because Judge Peck more or less said, you know, guys
20 -- as an artist from the bench would do -- you know, guys,
21 you ought to take care of these. And LBHI did. And those
22 claims were allowed.

23 What we had left at the hearing was nine or ten
24 people who had dropped out of the process. They had no
25 representation. They had had no appearance, and there was a

1 little housekeeping effort --

2 THE COURT: Well, how are you --

3 MR. SCHAGER: -- to clean up their claims.

4 THE COURT: I'm sorry, Mr. Schager, I may not be
5 an artist from the bench, but I try to pride myself on being
6 extremely patient. And I do not understand what you're
7 talking about.

8 MR. SCHAGER: The equity accrual claims, Your
9 Honor, were --

10 THE COURT: What's an --

11 MR. SCHAGER: -- allowed. It's --

12 THE COURT: -- equity --

13 MR. SCHAGER: -- that --

14 THE COURT: What's an equity accrual claim?

15 MR. SCHAGER: That's the accrued equity claim that
16 you address in, I believe, it's Footnote 18 that you -- to
17 which you just referred. And those claims were allowed in
18 the LBHI --

19 THE COURT: Allowed --

20 MR. SCHAGER: -- proceeding.

21 THE COURT: Allowed and given what?

22 MR. SCHAGER: They were allowed as general
23 unsecured claims with the statutory priority for the 10,950.
24 And it's -- I'm not talking about something that's hidden
25 away somewhere or private. This is --

1 THE COURT: And what does that --

2 MR. SCHAGER: -- all reported in the transcripts.

3 THE COURT: What does that have to do with what
4 we're talking about today? I'm sorry. I just -- I'm not
5 following you so I can't --

6 Counsel, do you have -- can anyone help me out
7 here?

8 MR. SCHAGER: Can I try to respond to that
9 question and then you can invite --

10 THE COURT: I've asked you three --

11 MR. SCHAGER: -- Ms. Chau's comments --

12 THE COURT: -- times to explain it to me and I
13 still do not know what you're talking about and what it has
14 to do with where I started 45 minutes ago, which is that I
15 rendered a decision in LBHI with respect to the entitlement
16 of the RSU claimants. I know that you disagree with it and
17 I know that it's up on appeal.

18 That being said, the arguments in the papers --
19 and I haven't seen the surreply because it wasn't authorized
20 and it was filed at 9:00 last night -- make the same
21 arguments. They make the same arguments about the RSUs. So
22 I've rejected that in the November 3rd opinion, and I have
23 not been told any reason why it's not applicable and
24 dispositive here.

25 MR. SCHAGER: The so-called accrued equity claims,

1 the claims Your Honor addressed in Footnote 18, those were
2 identified as claims where employees had earned their
3 compensation. They had earned their commissions. All the
4 documents support that they earned commissions and some
5 portions of those commissions were withheld by the employer,
6 LBI -- by the employer, LBI --

7 THE COURT: Withheld. Okay.

8 MR. SCHAGER: -- right?

9 THE COURT: That was an issue that we tried in the
10 RSU trial that we had some months ago because one of the
11 arguments was that there was compensation "withheld" and
12 then paid -- that there was cash money withheld in order to
13 and in exchange for that or in lieu of that there was
14 deferred compensation paid in the form of RSUs.

15 That wasn't -- that wasn't a finding that was ever
16 made. That was an argument. That was testimony by
17 witnesses along the lines of you took my money and you held
18 it for me and you promised to buy something that turned out
19 to be worthless now. That was not an argument that
20 prevailed.

21 MR. SCHAGER: That's not the argument I'm making
22 now, Your Honor. The argument I'm making now is that there
23 was never anything purchased with that money. And those
24 were the claims that LBHI did not bring into the trial
25 except with respect to eight or nine or ten people who

1 didn't appear, who weren't represented by counsel and they
2 basically defaulted. It is the --

3 THE COURT: Are there --

4 MR. SCHAGER: -- accrued equity claim and that's
5 what we're dealing with in these claims, money that was
6 withheld for which RSUs were never issued. And that's a
7 claim by an employee against an employer. That's got to be
8 treated separately than the --

9 THE COURT: But so --

10 MR. SCHAGER: -- RSUs generally.

11 THE COURT: So then if the claim is that the RSUs
12 weren't issued, then -- well, then we'll issue them the
13 RSUs.

14 MR. SCHAGER: We will issue them the RSUs, Your
15 Honor?

16 THE COURT: Yes, sir.

17 MR. SCHAGER: I don't -- I'm not sure -- I don't
18 want to be facetious about that, but I think you would have
19 --

20 THE COURT: We --

21 MR. SCHAGER: -- a hard time getting LBHI to issue
22 RSUs at this point.

23 THE COURT: Oh, no. We can -- we can do it under
24 the plan. We did this in the other trial, Mr. Schager.
25 There -- the RSUs are subordinated and entitled to a share

1 of the reorganized equity.

2 MR. SCHAGER: And what we --

3 THE COURT: So --

4 MR. SCHAGER: -- did in the trial was convert the
5 RSUs that had been issued --

6 THE COURT: Right.

7 MR. SCHAGER: -- into shares and treat them like
8 shares.

9 THE COURT: Okay.

10 MR. SCHAGER: We did not get into the accrued
11 equity claim --

12 THE COURT: And so now we're --

13 MR. SCHAGER: -- except to the extent --

14 THE COURT: -- so now we're --

15 MR. SCHAGER: -- of your --

16 THE COURT: -- so now we're at the --

17 MR. SCHAGER: -- Footnote 18.

18 THE COURT: -- crux of it. You're saying that --

19 MR. SCHAGER: And when --

20 THE COURT: -- there was a failure to issue the
21 RSUs and, therefore, there's a money damage claim associated
22 with the failure to issue the RSUs.

23 MR. SCHAGER: My complaint is not, Your Honor,
24 that the RSUs were not issued. The issue is what was
25 withheld from compensation that you earned and where did it

1 go. And it didn't go --

2 THE COURT: But if we --

3 MR. SCHAGER: -- anywhere. It was held. It's an
4 employee who wasn't paid his compensation. He wasn't paid --

5 -

6 THE COURT: No. Mr. --

7 MR. SCHAGER: -- his salary.

8 THE COURT: -- Schager -- Mr. Schager, we did this
9 in the other trial. There was an allegation that
10 compensation was withheld. And there was -- that was not
11 sustained. That allegation --

12 MR. SCHAGER: Because RSUs were issued for the
13 compensation that was at issue there.

14 THE COURT: No. No. No. No. No. No. No.

15 You're switching gears. There are two issues. Number one,
16 you say compensation was withheld and I say there was that
17 identical allegation in the LBHI RSU trial and it was not
18 sustained.

19 Number two, you say RSUs were not issued. I say,
20 okay, if the RSUS were not issued that does not convert the
21 breach of the contract to issue the RSUs a security into a
22 claim for cash money damages. Your clients want cash. They
23 don't want RSUS. They had the RSUS in the other case. It
24 entitles them to a percentage share of the reorganized
25 equity. They don't want that. It's not worth anything.

1 They want cash money and you have not told me anything here
2 today that entitles these claimants to have a claim for cash
3 money against LBI.

4 MR. SCHAGER: I'll try to illustrate it another
5 way, Your Honor, and that's this. We have two claimants
6 here, Claimants Benson and Petricelli (ph) who submitted
7 their claims as many people did in both proceedings. I
8 didn't file their claims for them, but they filed and then I
9 inherited the claims as filed.

10 One of their claims was for commissions earned in
11 2008 that were not paid. Okay. And they made that claim in
12 both proceedings. One of the things we're talking about now
13 that I'm talking about with trustee's counsel is addressing
14 those claims differently because they were allowed. Those
15 claims for money withheld in 2008 were allowed in the LBI
16 proceeding, not in the trial, but in the discussions
17 beforehand.

18 So, obviously, they're not going to get them.
19 They're not going to get a double dip. Right. No one's
20 looking for a double dip. But there were other people who
21 didn't make those claims in the LBI -- LBHI proceeding and
22 they're in the same position. This was money that was
23 withheld. You -- you tell me I'm switching gears, but I'm
24 not switching gears. I'm addressing a claim that was not
25 addressed in the LBI proceeding because there weren't any

1 people pursuing claims for accrued equity. There was a
2 housekeeping detail that LBHI's counsel slipped in there for
3 a very small number of people, nine or ten people, who were
4 no shows, defaulters --

5 THE COURT: Okay. Could we --

6 MR. SCHAGER: -- and that's -- that's what you
7 addressed in --

8 THE COURT: Could --

9 MR. SCHAGER: -- Footnote 18.

10 But the other claims --

11 THE COURT: Hold on. Hold on. Let's talk about
12 Benson and Petricelli's claim.

13 MR. SCHAGER: Please, Your Honor. Yes.

14 THE COURT: Okay. What are they claims for?

15 MR. SCHAGER: Benson and Petricelli in this case,
16 Your Honor --

17 THE COURT: Yes.

18 MR. SCHAGER: -- have claims for severance pay
19 which I believe -- and Ms. Chau can correct me -- but I
20 think the severance pay claim is going to be allowed.

21 THE COURT: Yes. Okay.

22 MR. SCHAGER: They have a claim for some bounced
23 checks and --

24 THE COURT: Yes.

25 MR. SCHAGER: -- I think those claims --

1 THE COURT: It's going to be allowed.

2 MR. SCHAGER: -- are going to be allowed.

3 THE COURT: Okay.

4 MR. SCHAGER: Right.

5 THE COURT: What else?

6 MR. SCHAGER: They have a claim for a -- some --
7 what's referred to as a cobra payment and I think that's
8 going to be allowed.

9 THE COURT: Okay.

10 MR. SCHAGER: They have a claim for RSUs and
11 obviously that's a big issue.

12 THE COURT: Okay. So --

13 MR. SCHAGER: And they have a claim for their 2008
14 withheld compensation --

15 THE COURT: Okay.

16 MR. SCHAGER: -- which I think is going to go away
17 because it was an allowed claim previously.

18 THE COURT: Okay. Then we're just talking about
19 RSUs.

20 MR. SCHAGER: In their cases, yes. There are
21 other people who didn't get -- that didn't have claims in
22 the LBI proceeding. What they have is a claim for money
23 withheld from their compensation in 2008, very small,
24 relatively small part of this dispute, but it's real and
25 some of the numbers are pretty big. But those are claims

1 for un -- withheld compensation in 2008 that were never --
2 and I'm probably -- practically quoting Judge Peck here --
3 that were never converted to RSUs. And that is a different
4 type of claim.

5 THE COURT: Can you show me --

6 MR. SCHAGER: But counsel from the Second Circuit
7 --

8 THE COURT: -- a piece of paper? I have no idea
9 -- if there was a failure to issue RSUs, that's a breach.
10 It's still subordinated under 510(b). It -- you never
11 established that people got a paystub from which cash money
12 was withheld. That was never established. I don't see any
13 allegation on that.

14 MR. SCHAGER: It was discussed carefully in the
15 stipulation of facts. It was not an issue -- in the other
16 proceeding. It was not an issue in the hearing because all
17 the claims were allowed prior to the hearing. But it was
18 certainly documented in the stipulation of facts. It was
19 paragraphs 18 and 19 of the stipulation of facts --

20 THE COURT: In the stipulation of facts --

21 MR. SCHAGER: -- and pages --

22 THE COURT: -- in the LBHI trial?

23 MR. SCHAGER: The treatment of the withheld
24 compensation in 2008. That's correct, Your Honor, because
25 the documents that were referred to and relied on in the

1 stipulation of facts were LBI documents and they were --

2 THE COURT: I'm terribly sorry, but I'm going to

3 say it again. I just don't know what you're talking about.

4 I'm sorry.

5 MR. SCHAGER: Your Honor, I could probably spend

6 the whole morning and not be articulate enough to be clearer

7 than I'm trying to be. I will say --

8 THE COURT: And I greatly apologize. I just --

9 MR. SCHAGER: Yeah. No.

10 THE COURT: I'm trying really hard to figure out

11 what you're talking about to determine if there's any merit

12 to it.

13 MR. SCHAGER: I --

14 THE COURT: You know, I keep coming back to where

15 I started.

16 MR. SCHAGER: I did agree to this hearing. I did
17 not anticipate that an omnibus reply would be handed to me a
18 week before the hearing. I did my best to get our firm to
19 put together a responsive pleading and I think --

20 THE COURT: Mr. Schager --

21 MR. SCHAGER: -- we have addressed these --

22 THE COURT: Mr. Schager, just answer --

23 MR. SCHAGER: -- points in the pleading.

24 THE COURT: -- just answer my direct question.

25 All right.

1 MR. SCHAGER: Yes, Your Honor.

2 THE COURT: The opinion that I issued on November
3 3rd with respect to the RSUs in LBHI, is it or is it not
4 dispositive of the claims that you're asserting here subject
5 to your rights on appeal?

6 MR. SCHAGER: Subject to our rights on appeal the
7 claim -- the decision would be dispositive on the RSU
8 portion of the claim.

9 THE COURT: Okay.

10 MR. SCHAGER: The directive of the Second Circuit
11 is you don't taint someone with being a shareholder and put
12 all of his claims into a shareholder bucket. You've got to
13 look at the individual claims. That's in the Med
14 Diversified case.

15 The claims --

16 THE COURT: Whoa. Whoa. Whoa. Wait --

17 MR. SCHAGER: -- for accrued equity --

18 THE COURT: Stop. Stop.

19 MR. SCHAGER: -- are different claims and they
20 were not addressed in the three-day hearing that we had last
21 spring except for --

22 THE COURT: How many --

23 MR. SCHAGER: -- this little cleanup.

24 THE COURT: -- claims for accrued equity are in
25 the claims that are before me today?

1 MR. SCHAGER: Offhand I guess, Your Honor, I think
2 it's about a half a dozen or eight.

3 THE COURT: And you believe that those --

4 MR. SCHAGER: That point is only made in one of
5 the omnibus -- or maybe two of the omnibus objections raise
6 and address accrued equity claims. The other omnibus
7 objections do not.

8 THE COURT: And when you say accrued equity claims
9 you mean claims that were --

10 MR. SCHAGER: In the document -- if I may, Your
11 Honor? In the documents it is clear and there are documents
12 in this proceeding in support of the omnibus reply that
13 illustrate it. In 2008 there was money withheld that was
14 called equity accrual calculated and that's been referred to
15 in shorthand as the claim for accrued equity. It was equity
16 accrual calculated. It was money that was withheld in the
17 2008 --

18 THE COURT: Okay. But it wasn't --

19 MR. SCHAGER: -- in the -- if I may --

20 THE COURT: But it wasn't --

21 MR. SCHAGER: -- finish, Your Honor.

22 THE COURT: -- it wasn't money --

23 MR. SCHAGER: -- in the 2008 fiscal year. And
24 those were -- that money had been identified carefully by
25 Judge Peck as far back as 2011 as being in a different

1 category than the RSUs. I apologize, Your Honor.

2 THE COURT: Do you have any response to this
3 because I -- I am obviously quite lost.

4 MS. CHAU: Yes, Your Honor. I think that he was
5 at some point -- Mr. Schager was at some point referring to
6 the fact that LBHI may have settled some claims in its
7 proceeding for reduced amounts. Of course, the fact that
8 LBHI chose to settle certain claims is not dispositive of
9 the validity of those claims -- of similar claims.

10 THE COURT: But do you know what -- do you know
11 what these accrued equity claims are that --

12 MS. CHAU: Yes.

13 THE COURT: -- would fall -- that would survive
14 Footnote 18 so to speak? I mean, these are claims based on
15 the claimant's right to receive RSUs. They didn't -- they
16 either received the RSUs. They're now worthless. They want
17 money instead. I said, no, you can't do that, or they had a
18 right to receive RSUs that were never issued and that was --
19 that's simply a breach of a contract to issue a security
20 which is also a subordinated claim. That's it.

21 And I -- Mr. Schager, I think is trying to
22 convince me that there's something more, but I'm not seeing
23 it. And maybe you can help me.

24 MS. CHAU: Yes, Your Honor. I mean, our position
25 is that these claims are exactly identical to the claims

1 that were at issue in the LBHI proceeding. I believe that
2 LBHI did choose to settle some claims at some point in the
3 past, but these claims were discussed during the hearing.
4 You are correct that what he's referring to and what we also
5 refer to as the accrued equity claims are these claims where
6 in 2008 they say that they earned the right to receive
7 equity awards that were never issued, and then that issue
8 was directly addressed in front of Your Honor and in Your
9 Honor's ruling.

10 THE COURT: I mean, it would lead to the rather
11 absurd result that somebody who worked for Lehman for 20
12 years and had a huge amount of RSUs would get, under my
13 ruling, nothing, but someone who worked for Lehman for a
14 year and had an accrued but unclaimed right to receive RSUs
15 would receive cash.

16 MS. CHAU: Yes, Your Honor.

17 THE COURT: So that simple example highlights the
18 lack of merit of the position and the sense, if you will, of
19 characterizing a breach of an obligation to issue the equity
20 at the same level as equity that was already issued.

21 So from my perspective, Mr. Schager, and there are
22 these other aspects of these claims that you, I think,
23 correctly identified as being pulled out and allowed. So
24 we're not talking about those.

25 But with respect to all of the claims that are

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1 asserted relating to RSUs and the failure to issue RSUs, my
2 ruling today is that my opinion dated November 3rd, 2014 and
3 the subsequent order dated November 7th, 2014, which is now
4 up on appeal, is applicable here and I'm going to follow it
5 so that we should enter an order to that effect and you will
6 have your appeal rights and you can take it up and
7 consolidate it.

8 I do think that one could make the observation
9 that because this is LBI -- they're LBHI securities so I
10 think it's on all fours. To the extent that one wants to
11 take into account the difference between LBI and LBHI, you
12 could throw the Claren Road (ph) holding into the mix
13 because LBI and LBHI are affiliates.

14 So you might -- someone might additionally observe
15 that you also need Claren Road because of the affiliate
16 connection. I'm not sure that you do. Either way you get
17 to the same bottom line which is that the objection is
18 sustained.

19 MS. CHAU: Thank you, Your Honor.

20 THE COURT: You can have a turn to tell me that
21 you don't know what I'm talking about, Mr. Schager, if you
22 like. I know you disagree with me.

23 MR. SCHAGER: I think I'll try to say two things,
24 Your Honor. One is this; that there are other aspects of
25 these objections that I think ought to be resolved by

1 counsel. Ms. Chau and I have talked about them in advance.
2 There are some details about certain claims that shouldn't
3 be in front of the Court because there's an understanding
4 that they will be allowed and you shouldn't --

5 THE COURT: Okay.

6 MR. SCHAGER: -- have to dig through the papers to
7 do that and I don't think there should be an order --

8 THE COURT: I think that -- I think that in the
9 reply there was an attempt to go through the other aspects
10 of the claims and there were indications that I think all of
11 them appear to have been resolved, those other aspects.

12 MS. CHAU: All but one, Your Honor.

13 THE COURT: Okay.

14 MR. SCHAGER: There are a couple of ambiguities
15 there --

16 THE COURT: All right. Well, why don't you --

17 MR. SCHAGER: -- and severance allowed in one and
18 not in the other case, and a description of a certain claim
19 that I couldn't quite understand. And, you know, if I live
20 this and don't understand it I don't think you should be
21 required to parse through it.

22 The second thing, Your Honor, I mean, I -- I
23 understand what you're saying about the RSUs and I
24 understand your views of your decision of November 3. And
25 I'm not going to dwell on it, but --

1 THE COURT: Let me be perfect --

2 MR. SCHAGER: -- I want to ask what --

3 THE COURT: Let me be perfect -- let me say this
4 out loud, okay. I was -- that wasn't a happy day for me to
5 tell those employees that their \$350 million in claims
6 couldn't be allowed, not my first choice, but I have to
7 follow the law. I felt quite sad for a number of those
8 claimants, indeed all of them, who worked hard for this
9 enterprise and who were, in every sense, victims of Lehman's
10 failure.

11 But I have to follow the law and the law to me was
12 clear. To the extent that the District Court and the
13 Circuit say that I was wrong, I will accept that and I will
14 be happy for those employees. But that -- but that's where
15 we are now.

16 MR. SCHAGER: I --

17 THE COURT: I just don't want you to -- I think
18 that sometimes folks can feel, as I think some of your
19 clients did, that Lehman always wins or that the Court is
20 always on Lehman's side, not true, not true. I follow the
21 law based on the arguments that are presented before me.
22 And I know given your experience that you can -- that you
23 can appreciate that.

24 But I take no pleasure in denying employee claims.

25 MR. SCHAGER: Thank you, Your Honor, for that

1 comment. I -- the second comment I want to make is this.
2 You're going to be calling for an order and an order is
3 going to be submitted. The one thing I would ask is this;
4 that the -- this equity accrual argument was addressed in a
5 very cursory way. What you're summarizing as your views of
6 it is not really what happened in -- as would apply in this
7 case because you didn't have those claims in front of you in
8 the LBHI case.

9 An order will be submitted by the trustee, by the
10 trustee's counsel, and I'm going to be offering some
11 contrary comments on it because I don't think we're going to
12 be able to settle the form of an order, and in that context
13 and the context of my comments I respectfully request Your
14 Honor to understand the circumstances of this briefing. I
15 know that surreplies are not permitted, but we know the
16 situation here is that the omnibus reply was quite a bit
17 different than the initial objections and we never had an
18 opportunity to comment on it.

19 THE COURT: Okay. I --

20 MR. SCHAGER: I hope Your Honor will --

21 THE COURT: Now I'm --

22 MR. SCHAGER: -- give me the good grace of
23 considering the response that we submitted last night in the
24 context of signing the order.

25 THE COURT: Okay. I'm not going to open myself up

1 to criticism that you filed pleadings that I didn't
2 consider. That -- I'm not going to have that be a basis for
3 being overturned on appeal.

4 So, number one, there -- there was a surreply
5 that's not contemplated by the rules.

6 Number two, it was filed without any notice to us
7 at minutes before nine last night.

8 Number three, none of this is new because it's all
9 the same thing that we did in the LBHI case. So I don't --
10 again, I don't know what you mean.

11 To the extent that some of these claims assert
12 claims for RSUs that you say were accrued, but were not
13 issued, my ruling applies with equal force that that simply
14 is a claim for the breach or the failure to issue
15 securities, a claim which is also subject to subordination
16 under 510(b).

17 MR. SCHAGER: Okay.

18 THE COURT: If you want me to go and read your
19 brief before I enter the order, and if upon reading your
20 brief I reconsider what I just said, we will reconvene the
21 hearing. But you're saying that you're going to undertake a
22 debate in the context of the order. I don't know what that
23 means. I'm -- I've ruled. So I don't know what you mean.

24 If you feel that I didn't address it enough in the
25 LBHI proceeding, that doesn't matter. If I did, I'm

1 applying it. If I didn't, I'm articulating it here on these
2 papers now. So I don't know what -- I don't know what to
3 make of your saying that you're going to have a debate on
4 the order.

5 MR. SCHAGER: I was assuming, Your Honor, that the
6 trustee's counsel would be submitting a form of order for
7 you to sign and --

8 THE COURT: Sure.

9 MR. SCHAGER: -- and that would be on notice and I
10 --

11 THE COURT: Right.

12 MR. SCHAGER: -- I would respond to it.

13 THE COURT: Well, I don't want you to respond to
14 me. I mean, the order should reflect the dispositions here
15 today and I want to go through all the non-RSUs objections
16 to make sure that -- I want to fully dispose of all of these
17 objections. So you highlighted a number and the trustee
18 highlighted a number of other claims that were either going
19 to be allowed or not allowed. And I want to make sure we
20 have everything covered. Okay.

21 You highlighted a number of claims that were going
22 to be allowed, so the order should reflect that, aspects of
23 claims, right?

24 MR. SCHAGER: Okay.

25 THE COURT: Okay.

1 MR. SCHAGER: And we have a -- will we have an
2 opportunity, Your Honor, to discuss those claims as we did
3 before the hearing today? I think it would be useful to the
4 Court to clean up as many of these things as possible.

5 THE COURT: Okay. You identified a group that are
6 allowed. What else? What remains not in the RSU bucket and
7 not in the bucket of claims that you've asserted that the
8 trustee has agreed to allow, what's left?

9 MR. SCHAGER: I think there are some -- I think
10 there are one or two non-RSU, non-equity accrual claims --

11 THE COURT: Okay. Let's talk about them. Which
12 ones are they?

13 MR. SCHAGER: One that comes to mind, Your Honor,
14 is the claim of John Marzoni (ph). It's addressed --

15 THE COURT: Okay.

16 MR. SCHAGER: -- obliquely in the papers and I
17 think there's a -- again, I think there's a way that we
18 could work this out with the trustee's counsel.

19 Mr. Marzoni's claim was that he was retained by
20 LBI and given a commitment of \$400,000 to come to Lehman and
21 develop a new business. That commitment was \$400,000 over
22 two years payable in monthly instalments, but the nature of
23 the agreement was not an employment contract. It was come
24 to us, get this business started. It won't be revenue
25 producing at the beginning, but it will be over time and

1 we're committing to pay you \$400,000 for coming --

2 THE COURT: But what the --

3 MR. SCHAGER: -- in and starting --

4 THE COURT: What the trustee --

5 MR. SCHAGER: -- that business.

6 THE COURT: What the trustee says about Mr.

7 Marzoni's claim is at page 18 of the omnibus reply,
8 referring to Claim 5501. Mr. Marzoni asserts a claim for
9 monthly draw purportedly owed pursuant to an employment
10 contract between Mr. Marzoni and LBI for periods after the
11 filing date.

12 Trustee objected to this portion of Claim 5501 on
13 the basis that the employment contract in question entitled
14 Mr. Marzoni to such payments only for periods of active
15 employment with the firm and Mr. Marzoni was not actively
16 employed by LBI during the post-filing period dates in
17 question.

18 So that's the bid and the ask on that.

19 MR. SCHAGER: Well, a little more than that, not
20 much. But the one is that what you've got is the employment
21 agreement itself submitted -- if that's what it's called --
22 or the agreement to pay \$400,000 and Mr. Marzoni's affidavit
23 of it, which is, of course, something admissible as
24 evidence.

25 What we have here is counsel's characterization of

1 what LBI feels this is all about. But as an evidentiary
2 matter there's no evidence of how LBI treated this
3 employment agreement. There's just this --

4 THE COURT: Okay.

5 MR. SCHAGER: -- summary of --

6 THE COURT: Okay. But --

7 MR. SCHAGER: -- of papers.

8 THE COURT: -- did Mr. Marzoni work for LBI during
9 the post-filing period?

10 MR. SCHAGER: I don't believe so, Your Honor.

11 THE COURT: Okay.

12 MR. SCHAGER: I'm not sure of that. I don't
13 believe so.

14 THE COURT: So Mr. Marzoni is making a claim for
15 money, but he never worked -- did any work?

16 MR. SCHAGER: No. That's not true. He was
17 promised a payment over time --

18 THE COURT: No. No.

19 MR. SCHAGER: -- for bringing in business and
20 starting a business at Lehman, and he came. He worked at
21 that business. He started that business and got it going
22 and it was profitable. So he -- he basically sold Lehman
23 his ability to build a business and they bought it and they
24 were paying him over time.

25 MS. CHAU: Your Honor, the contract which is

1 attached to Mr. Marzoni's claim says that he is entitled to
2 payment of, I believe, \$33,333 every month while he was
3 actively employed by LBI. He was not actively employed by
4 LBI after the filing date and he has not asserted that he
5 was.

6 So, I mean --

7 THE COURT: Mr. Schager, where -- show me in his
8 affidavit where he says he was actively employed by LBI.
9 It's at Docket 8802. I was a --

10 MR. SCHAGER: I'm afraid I do not have --

11 THE COURT: Okay.

12 MR. SCHAGER: -- Mr. Marzoni's affidavit --

13 THE COURT: I have it.

14 MR. SCHAGER: -- with me, Your Honor.

15 (Pause)

16 MR. SCHAGER: The point I was hoping to make, Your
17 Honor, was that these were things that we should be able to
18 work out in advance of submitting an order to Your Honor --

19 THE COURT: Well, we're just going to --

20 MR. SCHAGER: -- and how they're treating it.

21 THE COURT: I mean, we don't have a meeting of the
22 minds on this particular claim.

23 (Pause)

24 THE COURT: He says that the claim is based on
25 LBI's inducing me to leave my prior employment and to come

1 to work for LBI developing a business. During my initial
2 start-up phase of developing this business LBI guaranteed me
3 a payment of \$400,000.

4 I would suggest that you carve this claimant's
5 claim out of the order and make a determination as to
6 whether you agree or not. If there's no agreement we'll
7 have a -- proceed to a trial on the claim. I mean, you're
8 --

9 MR. SCHAGER: We'll try to avoid that, Your Honor.

10 MS. CHAU: Your Honor, just to go a little bit
11 more into depth about the trustee's argument on the claim, I
12 mean, Mr. Marzoni asserts that he was entitled to \$400,000
13 under the terms of his agreement with Lehman. The contract
14 conditions the continued payment to Mr. Marzoni on his
15 continued employment with LBI and it does so explicitly.

16 THE COURT: Can you send -- does someone have a
17 copy of the contract?

18 MS. CHAU: It is attached to his claim which
19 unfortunately I only have one copy of, but I could --

20 THE COURT: I have his response. It's not
21 attached to the response.

22 MS. CHAU: No. It is attached to his claim.

23 (Pause)

24 MS. CHAU: Yes. I believe it's also attached as
25 Exhibit 9 to my declaration filed with the reply.

1 THE COURT: Okay. Filed with the reply. Okay.
2 Give me a moment, then. Exhibit 9.

3 (Pause)

4 THE COURT: Do you have a page?

5 MS. CHAU: Yes. It's --

6 THE COURT: It's -- at the top on the docket it
7 numbers the pages. 130 maybe, one --

8 MS. CHAU: I have a version of it here that I
9 could approach and show Your Honor.

10 THE COURT: Okay. I'm sorry. I just can't seem
11 to -- I'm up to 8. Wait. I'm getting there. I'm getting
12 there. Here it is, Exhibit 9.

13 (Pause)

14 MS. CHAU: So he's attached this contract. And in
15 paragraph 1 it says during the first 24 months of your
16 active employment with the firm you'll receive a monthly
17 draw payment of \$33,333.

18 THE COURT: Okay.

19 MS. CHAU: If you turn to, I believe there's a fax
20 transmission page in the middle, but then the rest of his
21 contract was after that.

22 THE COURT: Right.

23 MS. CHAU: It states that his employment is at
24 will. There's no assertion that he was employed by the
25 trustee or LBI after the filing date. So the contract is

1 clear that while he's not employed by LBI he's not entitled
2 to further payments.

3 THE COURT: So is the point that he -- so this
4 contract -- you're not disputing this contract, whether
5 payments were made pursuant to the contract beginning in
6 January of 2007?

7 MS. CHAU: Yes, Your Honor.

8 THE COURT: But you're -- the trustee is saying
9 that he did not continue to work for LBI post-filing?

10 MS. CHAU: Yes, Your Honor. And he's seeking the
11 payments -- I think he says it explicitly in his declaration
12 that he's seeking the payments that would have been due if
13 he had continued to be employed by LBI post-filing.

14 THE COURT: Okay. Mr. Schager. And he doesn't --
15 if he wasn't working at LBI he doesn't get paid.

16 MR. SCHAGER: Your Honor, I've offered into
17 evidence Mr. Marzoni's understanding of this agreement. And
18 the agreement was part of his -- it's identified there as
19 Document 1. That's because he submitted it with his proof
20 of claim and I believe we also submitted it with the
21 opposition to the omnibus objection.

22 All I can offer you is Mr. Marzoni's testimony at
23 this point which I've done. I think there ought to be some
24 testimony back characterizing --

25 THE COURT: No. No. No. There's --

1 MR. SCHAGER: -- agreements --

2 THE COURT: -- only one issue. There's only one
3 issue, whether or not he worked at LBI post-filing -- post
4 the filing. It's a yes or no. He either worked there or he
5 didn't. If he worked there he gets paid. If he didn't, he
6 doesn't. It's no more complicated than that. It's not a
7 question of the interpretation of the contract. The
8 contract talks about his active employment by the firm.

9 MR. SCHAGER: Mr. Marzoni has not alleged, Your
10 Honor, that he was employed as of the petition date.

11 THE COURT: Then his claim needs to be disallowed.
12 There is a District Court opinion that was just issued two
13 days ago, in fact, affirming a decision of mine on a similar
14 case, somebody seeking to be paid a bonus, but not having
15 worked. So I'm going to deny the claim unless he wants to
16 come in and testify that, in fact, he worked for LBI after
17 the filing date. But you've said that that's not the case
18 so that, therefore, the claim has to be disallowed. Okay.

19 MR. SCHAGER: Thank you, Your Honor.

20 THE COURT: All right.

21 MS. CHAU: Thank you, Your Honor.

22 THE COURT: Is there any other loose ends, other
23 claims?

24 MS. CHAU: I believe that all of the rest of the
25 claims Mr. Schager and the trustee have an agreement on or

1 in the case of there may be one pro se claimant they did not
2 respond to that portion of the claim. It was, I believe, a
3 claim for a 401(k) that was not held at LBI. So they didn't
4 respond to those portions of the claims so --

5 THE COURT: So then the trustee's objection with
6 respect to that will be sustained.

7 MS. CHAU: Thank you, Your Honor.

8 THE COURT: Okay. If as you're going through this
9 and you -- because I want the order to fully dispose of
10 everything that was covered. If there's something that we
11 missed, then we'll have to -- we'll have to resume.

12 MS. CHAU: Yes, Your Honor. I think that we can
13 work with Mr. Schager for the rest of them.

14 THE COURT: Okay. All right. Mr. Schager, thank
15 you for your patience with me today.

16 MR. SCHAGER: Thank you, Your Honor --

17 THE COURT: All right.

18 MR. SCHAGER: -- for your patience with me.

19 THE COURT: Thank you.

20 MS. CHAU: Thank you.

21 (Recess taken at 11:37 a.m.; resume at 2:08 p.m.)

22 THE COURT: Good afternoon.

23 Okay. Thank you all for coming back today.

24 The -- now our purpose of coming back today was to
25 continue to discuss discovery issues that we were not able

1 to resolve last time. And in the interim I've had an
2 opportunity to go back and pour over the papers. And for
3 better or worse I have more questions than I did when we
4 were last together. So to the extent that this feels a
5 little bit like a do-over, I apologize, but I think it's
6 very important to have clarity about what it is we're about
7 to embark on.

8 The first question that I have is the original
9 application which was filed at Docket 24762 is styled
10 omnibus application of individual members of official
11 committee (I) and, (II) Indenture trustees.

12 Each indenture trustee that's seeking relief in
13 this application was a member of the committee. Is that
14 correct?

15 MS. COFFINO: That's correct, Your Honor.

16 THE COURT: Can anybody explain why the
17 application was styled the way that it was? In other words,
18 the (II) mention of indenture trustees to me seems to be
19 unnecessary.

20 MS. COFFINO: Do you want me to come to the
21 podium?

22 THE COURT: Sure.

23 MS. COFFINO: Your Honor, it was styled that way
24 specifically because the indenture trustees, there's two
25 parts to their claims. One is for their work on the

1 committee as committee members and one is for non-committee
2 work that they did as indentured trustee. And it is, if you
3 look at the declaration particular my client, Julie Becker
4 (ph), it's laid out in her declaration.

5 THE COURT: Well, that's where -- that's where my
6 confusion came from because in Judge Sullivan's order this
7 issue is not addressed.

8 MS. COFFINO: I think that's right. It's not
9 addressed. It's just whether committee members can get a
10 substantial contribution award for work done as committee
11 members. I think that's what's addressed in his -- I don't
12 know that it was ever argued. I think the issue that was
13 argued on appeal was that specific issue.

14 THE COURT: So say it again. The indentured
15 trustees who are -- who were committee members are seeking
16 two different buckets of expenses?

17 MS. COFFINO: Yes. I know Wilmington Trust is. I
18 defer to --

19 THE COURT: Well, there's a -- for Wilmington
20 Trust, for example, there's four different line items of
21 varying sizes.

22 So the non -- so there were professionals working
23 for Wilmington Trust, just by way of example, who were not
24 doing things connected to Wilmington Trust's role in the
25 committee?

1 MS. COFFINO: That's correct, in part. In part
2 it's -- it also seeks compensation for work done for
3 Wilmington Trust in their capacity as a committee member.
4 It's both. The claim is both or includes both.

5 THE COURT: And the claim is that wearing each of
6 these hats a substantial contribution was made.

7 MS. COFFINO: Yes. Not for the same work, though,
8 I mean, for different work done.

9 THE COURT: For different work done that was not
10 duplicative of work done by the committee.

11 MS. COFFINO: Yes. Yes.

12 THE COURT: Okay. When -- at the last hearing
13 which you were not able to attend --

14 MS. COFFINO: Right.

15 THE COURT: -- because you had a conflict, we
16 spent a lot of time going back and forth over what seemed to
17 me at the time to be merely procedural, how discovery and
18 how the presentation of the issues was going to play out.

19 But having been thinking about it a lot since then
20 and having gone back and looked at all of the documents, we
21 have to rethink what --

22 MS. COFFINO: Well --

23 THE COURT: -- what we concluded a couple of days
24 ago because I'm not prepared to go forward the way things
25 stand right now.

1 MS. COFFINO: We actually have rethought it. We
2 gave a lot of thought to it after last week's hearing and I
3 would like to speak to that issue --

4 THE COURT: Okay.

5 MS. COFFINO: -- for a few minutes.

6 We realize, of course, that there's been a
7 stumbling block between -- for us and the U.S. Trustee over
8 the last four months over this filing of the supplemental
9 claim and new declarations and the like, and we have
10 resisted because we didn't feel we had to put in evidence at
11 the beginning of the case as opposed to the end of the case.

12 But in considering your comments last week and the
13 arguments by the U.S. Trustee as to clarity, you know, we do
14 have a basic and a fundamental disagreement on the legal
15 standard here and whether -- I know that the U.S. Trustee
16 strongly feels that -- and putting aside the indentured
17 trustee work -- that committee members can never receive a
18 substantial --

19 THE COURT: Right. But --

20 MS. COFFINO: -- contribute -- they know that.

21 THE COURT: But we're --

22 MS. COFFINO: We differ.

23 THE COURT: That's --

24 MS. COFFINO: Right.

25 THE COURT: That's for --

1 THE COURT: Right.

2 THE COURT: That's for those above our pay grade

3 --

4 MS. COFFINO: That's right.

5 THE COURT: -- to decide, so.

6 MS. COFFINO: And we intend to prove extraordinary
7 case, extraordinary work, extraordinary results for a whole
8 host of reasons. But what we want to propose to facilitate
9 this is that within say the next three weeks we file what
10 we've been calling a notice of theory of the case or it
11 could be a notice of statement of the case -- the name is
12 not important -- that outlines what our theories are, what
13 our arguments are, including --

14 THE COURT: But --

15 MS. COFFINO: -- what we're asking for.

16 THE COURT: Okay. But let's focus on the last
17 point, including what you're asking for --

18 MS. COFFINO: Right. Uh-huh.

19 THE COURT: -- because when we were here together
20 last time I asked the specific question, are you standing by
21 your original application asking for every minute of every
22 hour and every penny of every dollar, and the answer was
23 yes.

24 MS. COFFINO: I know that. I read the transcript.
25 We wanted a little time to think about it.

1 THE COURT: Okay. Well --

2 MS. COFFINO: We've revisited that issue --

3 THE COURT: Well, I'm going to --

4 MS. COFFINO: -- and we may be -- in the end we
5 may be.

6 THE COURT: Okay. But let me --

7 MS. COFFINO: But --

8 THE COURT: -- let me try to inform your thought
9 process.

10 MS. COFFINO: Sure.

11 THE COURT: Because I was a little slow to focus
12 on this and it's a lesson in how to read judicial opinions
13 and perhaps on how to write them. But the most important
14 words that Judge Sullivan wrote on the substantial
15 contribution argument is not, in fact, in that section of
16 his opinion. It's in the previous section. And that was
17 the language that appears after his very long discussion of
18 Adelphia and the policies and how my dear friend, Judge
19 Gerber, did not get it right.

20 Be that as it may, the punch line is "To the
21 extent official committee members perform extraordinary work
22 to benefit the estate above and beyond normal committee
23 duties, they may, as will be explained below, seek to be
24 reimbursed under 503(b)(3)(D) and 503(b)(4)," et cetera.

25 So Judge Sullivan is clearly drawing a distinction

1 that I was trying to get at last time between, you wake up
2 in the morning and you have your daily committee call.
3 That's normal committee work. You sit on the phone for a
4 half an hour while tons of lawyers give you an update on the
5 case. That's normal committee work.

6 You get on the very first phone call meeting.

7 This is the first meeting of the creditors committee of
8 Lehman Brothers, normal committee work. It cannot be that
9 every single hour of every single day is extraordinary work
10 that's not normal committee work. It just cannot be.

11 And it -- if there's not going to be a further
12 refinement and breakdown of it, then I'm simply going to
13 deny the application without prejudice to re-file it because
14 as I said last time and I stand by now, I'm not going to be
15 the sorting hat here. I'm not going to go through all these
16 time records and have you make these presentations about
17 extraordinary work and then have to go through and extract
18 some things that I think were truly special.

19 That's your burden.

20 MS. COFFINO: We know that.

21 THE COURT: Okay.

22 MS. COFFINO: We know.

23 THE COURT: So that's your burden. So where
24 things stand now as far as I'm concerned, frankly, are a
25 non-starter. They're a non-starter in terms of applying

1 Judge Sullivan's rule of law which I have to because we're
2 on a remand.

3 The other thing is -- and, again, having gone back
4 through what was submitted to become more familiar with
5 this, right off the top -- and these are largely duplicative
6 of them. These are not the spoke declarations. They're
7 duped from one to the other. Right off the top you -- I can
8 easily observe things that are -- they're not going to pass
9 muster. Okay.

10 For example, near and dear my heart, the
11 involvement of Lehman in Innkeepers. For better or worse I
12 was there. There was a wildly unsuccessful first
13 transaction that was proposed that would have greatly
14 benefited Lehman. It didn't work. I think it's
15 inconsistent with a lot of the case law on substantial
16 contribution to seek to be compensated for stuff that didn't
17 succeed.

18 Also in that category one of the declarants talks
19 about participation in the Barclay sale. Well, the notion
20 that there was a substantial contribution in connection with
21 the Barclay sale is interesting to say the least. But then
22 the icing on the cake is to add the involvement in the
23 unsuccessful attempt to subsequently undo the Barclay sale
24 or augment the Barclay sale.

25 So you may disagree with me. That's your --

1 that's your right. But I am -- don't want to go down a path
2 that, from my mind, is destined to slam you into a brick
3 wall and that's where I see this now. And we haven't even
4 gotten to the issue of attorney/client privilege.

5 MS. COFFINO: Right.

6 THE COURT: Right, which is another brain -- makes
7 my brain smoke because it -- to the extent that you're going
8 to rely on -- you're going to assert attorney/client
9 privilege, I am having a hard time understanding how you're
10 going to discharge your burden and allow the U.S. Trustee
11 the opportunity to conduct discovery when most of the
12 documents are going to be privileged, either as between a
13 committee member on the one hand and committee counsel on
14 the other hand, or a committee member on the one hand and
15 committee members' individual counsel on the other hand.

16 So I just don't understand how you're going to
17 discharge your burden by saying, oh, look, here's what we
18 did and not reveal the documents that do that. I mean, in a
19 normal fee application, right, you -- you know, you redact
20 them or you make them general enough that you can see what's
21 going on.

22 So I'm sorry to ramble on, but --

23 MS. COFFINO: No. That's --

24 THE COURT: -- I just -- I've been worried about
25 this since you were here last time.

1 MS. COFFINO: I'll respond to it all.

2 First of all in the first issue I -- we understand
3 and we appreciate the guidance at this stage of the case --

4 THE COURT: Okay.

5 MS. COFFINO: -- really. That's part of what we
6 were going to do is go back and look and see --

7 THE COURT: Okay.

8 MS. COFFINO: -- what we can do. That was what
9 spurred our proposal.

10 THE COURT: Okay.

11 MS. COFFINO: Okay.

12 THE COURT: So we were -- great minds were
13 thinking alike.

14 MS. COFFINO: Yes. Yes. I read your transcript
15 --

16 THE COURT: Okay.

17 MS. COFFINO: -- carefully twice.

18 And on the second issue, you know, from our
19 perspective we didn't see this as a document intensive case.
20 We saw our case in chief relying mostly on witness testimony
21 and non-privileged documents because we -- you know, as I
22 sit here today I don't see how the substance of what the
23 advice was affects the award.

24 THE COURT: That's true. But I think -- and I'll
25 give Ms. Golden or Ms. Schwartz an opportunity to speak now

1 that they've heard -- I don't know if you shared this with
2 them before you came. I'm seeing head nods --

3 MS. COFFINO: I -- not that argument I didn't.

4 THE COURT: No. No. No. No. The -- that you
5 were going to --

6 MS. COFFINO: The proposal? No --

7 THE COURT: -- make a new submission.

8 MS. COFFINO: -- we didn't. No.

9 THE COURT: Okay. So I think that they -- they
10 will need, I'm guessing, some time to reflect and then see
11 what you come back with and then everybody will need to
12 regroup and --

13 MS. COFFINO: Right.

14 THE COURT: -- and decide what's going to happen
15 next because --

16 MS. COFFINO: Right.

17 THE COURT: -- I take your point that if the
18 witnesses -- if it becomes more apparent that you're talking
19 about, you know, tasks A through Z, items A through Z in
20 particular time periods, maybe it becomes a less document
21 intensive case.

22 MS. COFFINO: We clearly understand that you can't
23 use the privilege as a sword and a shield.

24 THE COURT: Exactly.

25 MS. COFFINO: We get that.

1 THE COURT: Right.

2 MS. COFFINO: And what -- but the only privilege
3 that we can, as individual creditors, waive are our own
4 privilege, the privilege between --

5 THE COURT: Right.

6 MS. COFFINO: -- of communications between, for
7 example, Wilmington Trust and Covington & Burling.

8 THE COURT: Right.

9 MS. SCHWARTZ: We can't waive the committee --
10 Individually --

11 THE COURT: Sure. Sure.

12 MS. COFFINO: -- they can't waive the committee's
13 --

14 THE COURT: Right.

15 MS. COFFINO: -- and, in fact, there are still
16 active litigations involving --

17 THE COURT: Oh, understood.

18 MS. COFFINO: -- some of those subjects.

19 THE COURT: Understood.

20 MS. COFFINO: So that's -- that is an issue. And
21 our position on the scheduling order initially was the
22 burden of producing a privilege log, which is a -- it's a
23 procedural issue. It's not your -- on the merits issue.
24 But was so extreme that we were concerned we would spend
25 more money litigating this claim than we were seeking.

1 THE COURT: Well --

2 MS. COFFINO: And because it's three-and-a-half
3 years of tens of thousands of documents from --

4 THE COURT: I understand. Oh, I --

5 MS. COFFINO: -- from professionals --

6 THE COURT: -- I understand.

7 MS. COFFINO: -- that we don't think we're going
8 to need to put into evidence to make our case.

9 THE COURT: Let me ask another question on a
10 different topic.

11 MS. COFFINO: Sure.

12 THE COURT: Has the money been paid to the --

13 MS. COFFINO: Yes, it was.

14 THE COURT: -- claimant group?

15 MS. COFFINO: It was paid after Judge Peck's
16 ruling and I think the order says that we don't have to give
17 it back until after a final order and there is no final non-
18 appealable order.

19 THE COURT: Okay.

20 MS. COFFINO: So --

21 THE COURT: Well --

22 MS. COFFINO: So what we propose to do on that --
23 and originally we said no, no log. We didn't want a log.
24 We couldn't get there. We do propose that what --
25 afterwards on ESI discovery and the privilege that we're

1 waiting to see what the document requests are because we
2 don't -- a document by document privilege log, as I
3 mentioned, is going to be extraordinarily expensive and
4 there may be some middle ground that we can come to once we
5 see the documents that are being requested.

6 THE COURT: Well, you know, your comment about the
7 sword and the shield is right. I don't think it's -- it's
8 not fruitful, I don't think, to discuss this more now
9 because --

10 MS. COFFINO: Okay.

11 THE COURT: -- they have to -- the U.S. Trustee --
12 and I see Mr. Oswald in the gallery here. Am I taking a
13 guess that you're here on behalf of the estate?

14 MR. OSWALD: Yes, Your Honor. For the trust.

15 THE COURT: For the trust. So the U.S. Trustee
16 and the trust have to see what you come up with.

17 MS. COFFINO: Right.

18 THE COURT: I mean, if you -- if you come back and
19 you say \$24 million, that's one thing. If you come back and
20 you say \$4 million, that's another thing. And one of the
21 themes that I went through or tried to go through repeatedly
22 last time was we've gotten the guidance from Judge Sullivan.
23 We're now back to a 503(b) substantial contribution
24 application. Let's try to act as if we're in, you know, a
25 normal world.

1 MS. COFFINO: Right.

2 THE COURT: Right. So in a normal world where a
3 503(B) substantial contribution application would come in,
4 the economic party in interest, here the trust, would have
5 something to say about it.

6 Now it's a little peculiar here because this was
7 originally part of a plan that obviously the debtor agreed
8 with. But now we have a situation in which there's \$26
9 million at stake. There's an -- there's an economic
10 interest that the trust has because to the extent that there
11 is -- to the extent that hypothetically I find for something
12 less than 26 million or you ask for something less than 26
13 million, that money comes back in.

14 So while I totally respect the U.S. Trustee's
15 position here, there is room for a fiduciary to be on the
16 other side of the conversation. If -- if this were a normal
17 case you would make the five -- you would make the
18 substantial contribution application. The debtor might
19 object. The debtor might say, well, that's too much, but
20 I'll give you half and I'll settle for that. And there
21 would be a 9019.

22 So everyone -- we have to have like a paradigm
23 shift here to think about this going forward.

24 MS. COFFINO: The only thing I would say is that
25 we did make a claim and they didn't object. We did make the

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1 claim. They did not object to either part, the 1129(a)
2 forward to be put in the plan or the 503(b) part of it.
3 They had the opportunity to object two years ago. The
4 debtors did not object.

5 THE COURT: Right, because it was part of --
6 because the construct there was that it was a plan payment.

7 MS. COFFINO: But the application itself had both.
8 The application --

9 THE COURT: I'm not going to tell anybody what to
10 do. I'm merely making the observation that we have a very,
11 very odd situation now because --

12 MS. COFFINO: I don't disagree with you on that
13 one.

14 THE COURT: It's just a -- it's a very odd
15 situation because there's -- there -- it does not seem to
16 me, and maybe Ms. Schwartz or Ms. Golden can correct my
17 impression. But it doesn't seem as if we're in
18 configuration as we would be in a normal case where there
19 might be a negotiation around a resolution of this. That's
20 all.

21 MS. COFFINO: Okay. Well, I guess I'll cede the
22 podium to see what comments they have.

23 THE COURT: I don't -- for what it's worth and
24 whether the estate -- the trust gets involved or not, I
25 don't view as -- I don't view the trust's hands as being

1 tied by what was proposed as part of the plan. But I'm not
2 directing that anybody do anything.

3 Ms. Schwartz.

4 MS. SCHWARTZ: Yes. Good afternoon, Your Honor.

5 Andrea Schwartz and Susan Golden for the United States
6 Trustee.

7 Your Honor, we appreciate your comments today and
8 in a way, you know, you're right. I mean, we were at the
9 paradigm shift, but we were in an awkward position when we
10 were last before the Court --

11 THE COURT: Well, I was slow -- I was slow on the
12 uptake.

13 MS. SCHWARTZ: Yeah.

14 THE COURT: And --

15 MS. SCHWARTZ: No. And I was in an awkward
16 position trying to explain to you what the other side was
17 trying to claim. So I apologize, Your Honor, if I wasn't --

18 THE COURT: There's -- you did your job and I
19 eventually --

20 MS. SCHWARTZ: Yeah.

21 THE COURT: -- I eventually got focused on what I
22 needed to get focused on.

23 MS. SCHWARTZ: Right.

24 THE COURT: So we are where we are and --

25 MS. SCHWARTZ: Right.

1 THE COURT: -- and Ms. Coffino is -- I think that
2 they -- they read the transcript and I think we're at a
3 different place now --

4 MS. SCHWARTZ: Yes. I hope we are.

5 THE COURT: -- from where we were.

6 MS. SCHWARTZ: I hope we are, Your Honor.

7 THE COURT: So --

8 MS. SCHWARTZ: And as -- and as Ms. Coffino
9 acknowledged to you, we had no idea about their proposal and
10 what they were going to do, et cetera. They hadn't reached
11 out to us.

12 But that said, I think something is important here
13 that we all -- we believe that the Court would be mindful of
14 is that the issue before the Court -- what first has to
15 happen is that the claimants have to establish a substantial
16 contribution claim under the law irrespective of whether or
17 not what Judge Sullivan said with respect to --

18 THE COURT: No. I'm with you, but it --

19 MS. SCHWARTZ: -- it being extraordinary --

20 THE COURT: -- but it's more than that. As --

21 MS. SCHWARTZ: Oh, I understand.

22 THE COURT: -- you pointed out to me last time --

23 MS. SCHWARTZ: Right.

24 THE COURT: -- because where my head was last time
25 was exactly what you just said.

1 MS. SCHWARTZ: Right.

2 THE COURT: But the nuance --

3 MS. SCHWARTZ: Right.

4 THE COURT: -- is that --

5 MS. SCHWARTZ: I understand. I know what it is.

6 I know --

7 THE COURT: It's --

8 MS. SCHWARTZ: -- the language inside and out,

9 Your Honor.

10 THE COURT: It's the -- it's the above and beyond
11 normal committee duties.

12 MS. SCHWARTZ: That's right. And --

13 THE COURT: So he has carved out from the possible
14 panoply of things --

15 MS. SCHWARTZ: Right.

16 THE COURT: -- that you can characterize as a
17 substantial contribution --

18 MS. SCHWARTZ: Right.

19 THE COURT: -- normal committee duties.

20 MS. SCHWARTZ: That's right.

21 THE COURT: So that's the \$26 million question.

22 MS. SCHWARTZ: Right. And, Your Honor, as we had
23 -- we had said, you know, first of all, we don't -- I don't
24 accept what Ms. Coffino said about our position on what
25 Judge Sullivan said, et cetera. When it comes time for us

1 to put it before you, we will. As I said to you the last
2 time I was before you, we read his decision to say that
3 there is no per se bar from -- of an individual committee
4 member making a claim for substantial contribution solely
5 because they served on the committee.

6 THE COURT: Right.

7 MS. SCHWARTZ: Okay. So that's -- so we're not
8 saying they can never ever make a claim. The question
9 really is going to be, Your Honor, whether or not they can
10 establish --

11 THE COURT: Well, we --

12 MS. SCHWARTZ: -- a substantial contribution.

13 And, wait, I just want to say this, please, Your Honor.

14 THE COURT: Uh-huh.

15 MS. SCHWARTZ: And that is that what the standards
16 require among very important of the standards being that
17 whether the service has benefited a creditor, the estate
18 itself or other interested parties, whether the service has
19 resulted in an actual significant and demonstrable benefit
20 to the estate, and importantly, Your Honor, whether the
21 services were duplicated by the efforts of others involved
22 in the case. And, Your Honor, there can be no question that
23 there were many, many others involved in the case.

24 So, I mean, to say -- I think the trouble I have
25 is that, you know, yes, they have to meet their burden of

1 proof, but we should not be prejudiced from what we can
2 discover. And so they don't dictate.

3 They make their claim. They can do whatever they
4 want. They can put forth whatever they want. We suggested.
5 We thought it was important. I think the Court now has
6 signaled to them, I think it's important that you identify
7 what your basis for your substantial contribution claim is
8 in light of the fact that you're seeking every single penny
9 that your counsel incurred over the life of the entire case.
10 I think they got that message, Your Honor. It sounds like
11 from their proposal they got that message from the Court.

12 But that said, I mean, Your Honor, where -- we
13 have the right and we have the ability to be able to
14 discover information to the extent that we object to what
15 they say that they did that was over and above, as Judge --

16 THE COURT: Well --

17 MS. SCHWARTZ: -- Judge Sullivan says the --

18 THE COURT: Normal duties.

19 MS. SCHWARTZ: -- normal committee duties.

20 THE COURT: Right. I mean, if -- he goes on in
21 the opinion -- it's at page 10 where he talks about in the
22 context of disagreeing with the U.S. Trustee's --

23 MS. SCHWARTZ: Right.

24 THE COURT: -- blanket no way, no how, never
25 rules.

1 MS. SCHWARTZ: Right. We understand that.

2 THE COURT: So he says the nevertheless.

3 MS. SCHWARTZ: Right.

4 THE COURT: Nevertheless there is no reason to
5 think that the Bankruptcy Code would punish an entity that
6 has made a substantial contribution solely because it was
7 also willing and able to serve --

8 MS. SCHWARTZ: Right.

9 THE COURT: -- on the official committee. He then
10 goes on to give an example. I find it hard to really
11 understand what his example means because it describes
12 something that only a committee member, frankly, or a debtor
13 would -- or a trustee would do --

14 MS. SCHWARTZ: Right.

15 THE COURT: -- because creditors generally can't
16 go and freelance and pursue things on behalf of the estate.
17 But I understand -- but I will apply the concept. He's
18 saying there's no per se rule so we're going to apply that
19 also.

20 MS. SCHWARTZ: Right. So, anyway --

21 THE COURT: But -- so --

22 MS. SCHWARTZ: -- all of that being said I think
23 it completely -- I agree completely.

24 THE COURT: But let's go to their -- let's go to
25 the -- and Ms. Coffino raises the spectre of it and I think

1 it's a valid point. This is not just going to be like, do
2 we have a couple of hours. We'll get this done. So it
3 raises for me the question of the cost and the burden of
4 going through this exercise because I think it's a very
5 labor intensive exercise.

6 MS. SCHWARTZ: What exercise, Your Honor? I'm
7 sorry, them --

8 THE COURT: The exercise --

9 MS. SCHWARTZ: -- being able to establish that
10 they can --

11 THE COURT: The exercise of preparing an
12 application that makes it out of the starting gate that
13 complies with Judge Sullivan's parameters.

14 MS. SCHWARTZ: Okay.

15 THE COURT: Have to -- you have to ferret out
16 normal committee duties. To your point you have to look at
17 the different ways you can establish a substantial
18 contribution. You have to ferret out duplicative. My
19 gloss, you have to, I believe, ferret out things that were
20 unsuccessful.

21 MS. SCHWARTZ: I have no disagreement on that,
22 Your Honor.

23 THE COURT: And then you're going to have a, I
24 would imagine, pretty substantially, no pun intended,
25 narrowed down application.

1 So if -- the goal posts move in, right. We're
2 saying you can't ask for everything. But Judge Sullivan
3 says you can ask for some things. And then we get to the
4 point where I would like this to act like a normal case
5 where the parties might actually work together to resolve
6 it.

7 MS. SCHWARTZ: We have to wait and see what we get
8 from the other side, Your Honor. Look, we've been --

9 THE COURT: Unless --

10 MS. SCHWARTZ: -- through --

11 THE COURT: -- everyone is predetermined that --
12 which is your right -- that you're going to the mat in the
13 sense of I'm going to have to give you a disposition that's
14 then going to go and then the whole thing is going to go up
15 on appeal to the Second Circuit because I believe that --
16 without putting words in your mouth -- your office wants to
17 establish that Judge Sullivan was wrong on the no per se
18 rule. Right?

19 MS. SCHWARTZ: Well, I'm not going to get -- go to
20 that, Your Honor. I'm not going to address it.

21 But what I would like to say to you is without
22 divulging any communications that have been made on the part
23 of the U.S. Trustee --

24 THE COURT: Within the U.S. Trustee --

25 MS. SCHWARTZ: -- under 408 I would never ever do

1 that. But the Court should know that we have made overtures
2 to understand what the basis of the other side's claim is.
3 We've been willing to see that. The position all along has
4 been, we filed our application. We don't -- we're not
5 required to put all the evidence in now, blah, blah, blah --

6 THE COURT: Who are you doing an imitation of
7 here, Ms. Coffino or someone else?

8 MS. SCHWARTZ: No. That's like my other side
9 imitation.

10 THE COURT: It's your generic other side.

11 MS. SCHWARTZ: It's my generic other side.

12 THE COURT: Okay.

13 MS. GOLDEN: And she's not kidding.

14 MS. SCHWARTZ: But the point being --

15 THE COURT: What's that?

16 MS. GOLDEN: She's not kidding. That's her
17 generic imitation in any case of the other side.

18 (Laughter)

19 MS. SCHWARTZ: But the point being there has been
20 a position and we have made overtures to be able to
21 understand how that can be and hasn't been --

22 THE COURT: But there --

23 MS. SCHWARTZ: -- it hadn't worked at that time.

24 So let us --

25 THE COURT: Okay.

1 MS. SCHWARTZ: -- put it to you this way, Your
2 Honor, you have now given the parties --

3 THE COURT: Guidance.

4 MS. SCHWARTZ: -- a little more guidance with
5 respect to where the Court kind of sees some of the issues
6 without prejudging anything, et cetera. We remain open to
7 hearing from the other side how --

8 THE COURT: I mean, I --

9 MS. SCHWARTZ: -- what they believe --

10 THE COURT: -- I gave you an example of what I
11 could imagine --

12 MS. SCHWARTZ: Right.

13 THE COURT: -- would fit the category that Judge
14 Sullivan seemed to be getting at --

15 MS. SCHWARTZ: Right.

16 THE COURT: -- which is -- again, I'm making this
17 up.

18 MS. SCHWARTZ: Yeah.

19 THE COURT: Committee member, one of the clients,
20 witnesses, you know, long gridlock on the issues, comes up
21 with an idea, comes up with a construct that he then spends
22 a lot of time calling his fellow committee members and
23 gaining support and staying up nights and weekends --

24 MS. SCHWARTZ: Right.

25 THE COURT: -- and that kind of thing where --

1 MS. SCHWARTZ: Right.

2 THE COURT: -- something, you know, really
3 extraordinary.

4 MS. SCHWARTZ: Yeah. And, Your Honor, let me just
5 say this. I think there's another issue here and I'm at
6 least going to preview it for Your Honor.

7 To the extent -- is someone on the phone. I'm
8 sorry.

9 MR. AHRENS: I'm sorry. This is Michael Ahrens.
10 I just coughed. Yes, I am on the phone.

11 THE COURT: I'm sorry. There is Michael Ahrens
12 from Sheppard Mullin for Bank of New York Mellon is on the
13 phone live and there -- U.S. Bank and Vanguard are on listen
14 only.

15 MS. SCHWARTZ: Okay. Thank you, Your Honor.

16 Your Honor, I think there's also an issue that --
17 and, again, it goes back to the same thing we said all
18 along. Tell us what your claim is now in light of that
19 decision. It wasn't coming out of the air. You know, we
20 thought it would be helpful to the process. We're not
21 looking -- I'm -- I'm not looking and neither is my
22 colleague or our office looking to be spending the next two
23 years of our lives doing discovery on their claim.

24 So the thought was that, you know, put it out
25 there. Let us know what the parameters of your claim are,

1 et cetera. But let me say this, Your Honor. To the extent
2 the other side -- the individual claimants say, well, the
3 committee counsel delegated to us, delegated to the
4 attorneys, then we get a question, well, why would committee
5 counsel do that. We don't think that's going to be the
6 case. I think, Your Honor, what you're going to see is, I
7 think you're going to see a whole heck of a lot of
8 duplication.

9 But let us wait and see what we discover. I'm not
10 going to foreshadow, et cetera. But I'm -- the only reason
11 I say that is you've got over \$200 million of paid fees to
12 the multitudes of counsel to the committee and advisors, et
13 cetera. So that factor as to the fact that -- to make a
14 substantial contribution claim you've got to show that you
15 did something that doesn't duplicate what somebody else did.
16 And then there's a question, well, why were you doing it
17 versus these, you know, the many, many, many fine counsel
18 that were representing the committee.

19 So, again, I think Your Honor is right in terms of
20 where the paradigm shift has been and I think what I would
21 suggest to the Court and to the individual creditors is that
22 they take the time that they need. We've said it all along.
23 Take as much time as you need to set out what your claim is
24 and what the dollar amounts are and why your claim meets the
25 standards of well established law under -- to make a

1 substantial contribution claim. And then we get to the
2 second part to see whether or not that could possibly be
3 considered something that is not in the course of their
4 duties as committee members.

5 And that --

6 THE COURT: Well --

7 MS. SCHWARTZ: We thought that that would save
8 time --

9 THE COURT: -- I don't --

10 MS. SCHWARTZ: -- really, frankly.

11 THE COURT: -- disagree with anything -- with
12 anything that you said, but I -- I do have a continuing
13 concern about -- I guess the committee members will come
14 back with a revised or a supplemental filing.

15 MS. SCHWARTZ: Right.

16 THE COURT: But like any litigant, sometimes
17 filings -- and I don't mean this in any negative way -- are
18 opening bids, negotiating positions, et cetera, et cetera.

19 And --

20 MS. SCHWARTZ: I understand. May I say something?

21 Your Honor, as I said, we're always open to them
22 --

23 THE COURT: Well, but I'm just -- and I don't mean
24 this critically the other way. I'm just not sure given the
25 view held by your office --

1 MS. SCHWARTZ: Well, I don't know what you're
2 referring to specifically on the view --

3 THE COURT: Let me finish my sentence and you
4 might.

5 Given the view held by your office as expressed in
6 the original motion that this would as per se rule would
7 never be appropriate. I'm just not sure that even if, to
8 pick a random number, the members of the committee were to
9 come back in the aggregate with -- I'm making -- completely
10 making this -- a \$4 million number which if the -- if there
11 were an economic party on the other side might say, it's a
12 reasonable settlement. We're going to settle this whole
13 mess for \$4 million, I'm just not so sure -- and I don't
14 mean this critically --

15 MS. SCHWARTZ: Right.

16 THE COURT: -- that your office would be inclined
17 to settle because of the principals of law that are
18 involved.

19 MS. SCHWARTZ: Well, can I respond, please?

20 THE COURT: Sure.

21 MS. SCHWARTZ: Sorry, Your Honor. I didn't mean
22 to interrupt before.

23 Well, first thing is I think the dollar amount is
24 not going to be the driver. In other words, it's what the
25 actual services were that were performed. And you're right.

1 We do not, absolutely do not and meaningfully do not have an
2 economic stake in it. We're not an economic party. Our
3 interest is that the law is upheld as we would like to -- as
4 we interpret it and as we present it to the Court for the
5 Court's determination.

6 So that's really what -- where the issues lie.

7 It's not going to be a matter of -- I think you're right. I
8 mean, the observation that you're putting in every single
9 dollar that you incurred in the course of a case, there's --
10 it's very reasonable to conclude that there's a portion of
11 that time that's in the normal course of -- if not all of
12 it. We don't know. But, certainly, it's not all a
13 substantial contribution, right, and they've acknowledged
14 they put every single penny in that they -- that they're
15 seeking.

16 That said, Your Honor, to the extent that they
17 have a basis for showing that they made a substantial
18 contribution claim under the standard law and in -- other
19 than in their normal duties as committee members, you know,
20 we're willing to discuss that with them. We've always been
21 and we've said it all along.

22 Now it might be in fairness to Ms. Coffino, there
23 was a point in time where Milbank was advancing this
24 argument on behalf of the individual creditors. And we had
25 --

1 THE COURT: Right.

2 MS. SCHWARTZ: -- we had discussions with them --

3 THE COURT: Right.

4 MS. SCHWARTZ: -- with respect to that. And I
5 just want to say one other thing, and I don't know and I can
6 get back to the Court on it. But I'm pretty sure that the
7 debtor reserved its rights on this particular issue with
8 respect to the substantial contribution claims to the extent
9 that the plan -- that that provision -- that the provision
10 of the -- the plan provision was overruled because we had
11 carved that out at the time of confirmation because we
12 didn't want to hold up confirmation.

13 THE COURT: Right.

14 MS. SCHWARTZ: And my recollection is that they
15 did, too, but I'm not exactly 100 percent sure. But I know
16 Your Honor has already said, look, the trust is here. The
17 trust can weigh in, et cetera.

18 THE COURT: Well, I just -- you know, I -- again,
19 I --

20 MS. SCHWARTZ: You might be -- Your Honor, look,
21 we have to see --

22 THE COURT: I don't feel --

23 MS. SCHWARTZ: -- what they say.

24 THE COURT: You know, Mr. Flores is probably --
25 Mr. Flores. Mr. Oswald -- I just --

1 MS. SCHWARTZ: Well, sometimes it's Mr. Flores.

2 THE COURT: I just took a couple of years off your
3 age, Mr. Oswald.

4 MR. OSWALD: I appreciate that.

5 THE COURT: You know, he's probably going to go
6 back to his office and call someone and say, what the heck
7 did you send me into down there. Okay.

8 But I think it's my view -- there's money here and
9 there are unsecured creditors. So to the extent that there
10 is ultimately a determination, and I think I pretty much
11 said it out loud today that it's not going to be the full
12 \$26 million.

13 So there's money that's going to come back into
14 the estate and I think that because, to the extent that
15 there would be discussions, it would be appropriate for
16 there to be a representative, a fiduciary of those
17 individuals who stand to get back some money.

18 Now this is Lehman, right, so \$26 million or a
19 fraction thereof --

20 MS. SCHWARTZ: Unfortunately, Your Honor, it's
21 every case today --

22 THE COURT: Well, it's --

23 MS. SCHWARTZ: -- you know, 26 million.

24 THE COURT: -- it's --

25 MS. SCHWARTZ: There's a lot of cases like that,

1 let's put it that way.

2 THE COURT: -- it's not a lot of money, but I --

3 I'm very jealous of every penny when it comes to giving

4 money back to the unsecured creditors. So --

5 MS. SCHWARTZ: Well, I think it's -- and it also
6 should be noted, Your Honor, at least the Court should
7 consider the U.S. Trustee has not and could have at several
8 times asked the Court to have them post a bond for security
9 of the money.

10 THE COURT: They're good for it.

11 MS. SCHWARTZ: You know, they've already been paid
12 the money --

13 THE COURT: If nothing else they're good for the
14 money.

15 MS. SCHWARTZ: Well --

16 THE COURT: I think we know where they all live.

17 All right. So, Ms. Coffino --

18 MS. SCHWARTZ: I think it's just a matter of
19 timing now of when they're going to file their papers. And
20 as Your Honor had said at the last hearing, we can file
21 opposition papers, supplemental opposition papers at any
22 time. You weren't requiring us to, but we could do that.

23 THE COURT: Well, we're -- I think we're going to
24 have to -- now we're going to take it one step at a time --

25 MS. SCHWARTZ: Okay.

1 THE COURT: -- and see what comes back.

2 MS. SCHWARTZ: Right. I mean, we'll still be able
3 to -- you mean like the timing of that.

4 THE COURT: I do want to -- and I'm saying this
5 largely directed to you, Ms. Coffino, and your colleagues, I
6 want to preserve all of your points for appeal. Okay.

7 Today was convenient. It was a status conference and sounds
8 a little bit like a ruling instead of a clarification. You
9 seem to have come in today knowing what I was going to say.

10 So I want to just make sure that I don't do
11 anything that has the effect of not preserving your rights
12 --

13 MS. COFFINO: We appreciate that.

14 THE COURT: -- for appeal. Okay.

15 MS. SCHWARTZ: Is that all, Your Honor?

16 THE COURT: Yeah. Yeah.

17 MS. COFFINO: I'll take the easiest thing first --

18 THE COURT: Okay.

19 MS. COFFINO: -- the factual. My colleagues have
20 reminded me that the debtors actually filed a declaration in
21 support of our application after the plan. So it's not that
22 they didn't do anything. They actually filed --

23 THE COURT: Okay.

24 MS. COFFINO: -- a declaration. But that's
25 neither here nor there. I just wanted to correct the

1 record.

2 The other thing I just wanted to say, and I
3 realize we are where we are and we have to move forward from
4 here, is that I don't want you think we've just been
5 recalcitrant and difficult. Until last week's hearing when
6 you raised the issue of whether there's too much in our
7 application we never understood that to be the U.S.
8 Trustee's problem. What we understood it to be was we might
9 be asking for something more other than what we did in the
10 committee or the indentured trustees have -- it's just the
11 indentured trustees did outside the committee, too. And we
12 kept -- we were confused because it's there. We're telling
13 you what it is because our view --

14 THE COURT: Right.

15 MS. COFFINO: -- is we can get it --

16 THE COURT: Well -- yeah.

17 MS. COFFINO: -- as a committee member.

18 THE COURT: Yeah.

19 MS. COFFINO: And so we've been disagreeing and
20 arguing over a point that's very different than the one that
21 you raised last week. And we heard you loud and clear,
22 which is why we conferred for a week and came up with this
23 just yesterday or the day before yesterday; that this is
24 what we should propose to the Court.

25 So that's where we are.

1 THE COURT: Well, it's going to -- I mean, to my
2 mind it's going to take some work.

3 MS. COFFINO: Yeah. I agree. It's going to take a
4 lot of work. I agree.

5 THE COURT: So what kind of time frame do you all
6 have in mind?

7 MS. COFFINO: Can we confer and then --

8 THE COURT: Sure.

9 MS. COFFINO: -- talk to the U.S. Trustee about it
10 and get back to you?

11 MS. SCHWARTZ: It's fine. Your Honor, that's
12 totally fine with us.

13 THE COURT: Is that fine with you?

14 MS. SCHWARTZ: Sure.

15 THE COURT: I mean, I don't want to -- I don't
16 want it to drag out forever, but I do think --

17 MS. COFFINO: No. We understand.

18 THE COURT: -- that it's a fair amount of work to
19 do -- to implement the different aspects of it that we've
20 talked about today. And, again, to reserve your rights on
21 appeal, you know, the other than normal committee duties,
22 that's in this opinion. That's like a non-starter as far as
23 I'm concerned. But some of the other things we talked about
24 in terms of the factors, you know, that goes to your making
25 your case.

1 I -- I mean, preliminarily I think duplicative
2 things are a problem. Preliminarily in most cases I think
3 things that were done that were unsuccessful are -- you
4 know, are a problem in the sense of not something that one
5 ordinarily thinks of as having been a substantial
6 contribution.

7 There was a big decision out of Delaware yesterday
8 denying a "normal substantial contribution claim." It's a
9 tough standard.

10 MS. COFFINO: It is a tough standard. And I get
11 completely the issue of unsuccessful efforts. That's pretty
12 clear. You can actually draw a bright line there.
13 Duplication is a little hazier and I think we want the
14 opportunity to show you why even though people were working
15 on the same thing it's not duplication.

16 THE COURT: Okay.

17 MS. COFFINO: Okay. And that's -- I think that's
18 a trial issue. But --

19 THE COURT: I hear you.

20 MS. COFFINO: Okay.

21 THE COURT: Okay. So then you will confer among
22 yourselves, make a proposal as to time, confer with the U.S.
23 Trustee. You can do a stip. You can do -- send me a
24 letter, whatever you want to do.

25 MS. COFFINO: Okay.

1 THE COURT: But don't let it just drag on too
2 long.

3 MS. COFFINO: Okay.

4 MS. SCHWARTZ: Your Honor, so -- just so I'm
5 clear. I want to make sure I'm clear. So what we're
6 talking about is a briefing schedule at this point.

7 THE COURT: Well, we're talking about them filing
8 a new application.

9 MS. SCHWARTZ: Okay. That's fine.

10 THE COURT: That's the first thing.

11 MS. SCHWARTZ: Yeah.

12 THE COURT: And --

13 MS. SCHWARTZ: As I've said, we've said it all
14 along. They can have as much time as they want from our
15 perspective as long as we have the same amount of time to
16 reply. That's all.

17 THE COURT: Yeah. Well, I don't --

18 MS. SCHWARTZ: Yeah.

19 THE COURT: I'm not into the as much time as they
20 want. I mean, I want you to do it --

21 MS. SCHWARTZ: No. That's okay. I'm just saying
22 there's no objection --

23 THE COURT: -- with all deliberate speed.

24 And, Mr. Oswald, since you did come down here
25 today I want you to think about what the trust's

1 involvement/position is going to be going forward in light
2 of my observations.

3 MR. OSWALD: We'll do that, Your Honor.

4 THE COURT: Anyone else?

5 MS. COFFINO: No. I'm just going to say thank
6 you.

7 THE COURT: Okay. Thank you.

8 MS. SCHWARTZ: Thank you, Your Honor.

9 THE COURT: Good to see everyone.

10 MR. AHRENS: Thank you, Your Honor.

11 (Whereupon these proceedings were concluded at 2:52 PM)

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